No. 91-872-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Anthony Salerno, et al.

Docketed:
November 27, 1991

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Solicitor General, Jacobs,John

Counsel for respondent: Jacobs,John, Newman,Gustave, Ellis,Robert, Hafetz,Frederick, Wall,Patrick M., Gaudelli,Albert, Segal,Marvin B., Goldberg,Jay, Tigar,Michael E., Loughlin,Walter P.

See service list.

Entry	Date	Note	Proceedings and Orders
1	Nov 27 1991	G	Petition for writ of certiorari filed.
4	Dec 17 1991		Brief of respondents Anthony Salerno, et al. in opposition filed.
2	Dec 23 1991		Waiver of right of respondent Aniello Migliore to respond filed.
3	Dec 31 1991		DISTRIBUTED. January 17, 1992
5	Jan 10 1992	X	Reply brief of petitioner United States filed.
6	Jan 21 1992		Petition GRANTED.
			**********
7	Feb 18 1992	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
8	Mar 2 1992		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
9	Mar 4 1992		SET FOR ARGUMENT MONDAY, APRIL 20, 1992. (1ST CASE).
12	Mar 5 1992		Brief of petitioner filed.
10	Mar 9 1992		Record filed.
		*	Original proceedings U.S.C.A., Second Circuit and U.S.D.C., Southern District of New York (12 Boxes--SEALED)
11	Mar 11 1992		CIRCULATED.
13	Apr 3 1992	X	Brief amicus curiae of New York Council of Defense Lawyers filed.
14	Apr 6 1992	X	Brief of respondents Anthony Salerno, et al. filed.
15	Apr 13 1992	X	Reply brief of petitioner United States filed.
17	Apr 20 1992		ARGUED.

91-872

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DANIEL C. RICHMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether Fed. R. Evid. 804(b)(1) authorizes the admission against the government of the former testimony of a declarant who has been rendered unavailable by his assertion of his Fifth Amendment privilege, even though the government lacked any motive to cross-examine the declarant when the former testimony was given.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Matthew Ianniello, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward J. Halloran, Aniello Migliore, and Alvin O. Chattin were parties in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 937 F.2d 797.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. A petition for rehearing was denied on September 24, 1991. App., *infra*, 53a-54a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Evidence 804(a)(1) provides:

Definition of unavailability. "Unavailability as a witness includes situations in which the declarant—

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement.

Federal Rule of Evidence 804(b)(1) provides:

Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

1. On April 7, 1987, a grand jury sitting in the United States District Court for the Southern District of New York returned a 35-count indictment against 11 defendants, including respondents Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, and Aniello Migliore. The indictment charged respondents with participating in the affairs of a racketeering enterprise known as the Genovese Organized Crime Family of La Cosa Nostra, and conspiring to do so, in violation of the Racketeer Influ-

enced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d). Among the 41 predicate acts alleged to constitute the pattern of racketeering activity were 16 charging fraud in the construction industry. Other predicate acts charged respondents and four other defendants with fraud against the International Brotherhood of Teamsters, illegal payoffs, the attempted extortion of an individual, extortion and fraud in the food industry, participation in illegal numbers and bookmaking businesses, and loansharking. App., *infra*, 6a-8a.

The trial began on April 6, 1987, and concluded 13 months later, on May 4, 1988. A large portion of the proceeding focused on the construction industry charges. The proof—based on extensive electronic surveillance and testimony by cooperating witnesses—showed that, between 1980 and 1985, respondents endeavored to rig the bids for concrete superstructure work on virtually every high-rise building in Manhattan that used more than $2 million worth of concrete. Through its control both over construction unions and the supply of ready-mix concrete, the Genovese Family, acting in concert with other La Cosa Nostra "families," created a "Club" of six concrete companies. In exchange for a payment of two percent of the contract price, the six companies were permitted to bid on large building jobs in Manhattan. The bids were rigged in accordance with an allocation of jobs by the Genovese Family and three other Mafia families. App., *infra*, 9a, 42a.

Prior to trial, pursuant to its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), the government informed respondents that Pasquale Bruno and Frederick DeMatteis had testified under immunity before the grand jury and might be sources

of exculpatory testimony. App., *infra*, 14a. The two—both principals in the Cedar Park Concrete Construction Corporation, which had allegedly been one of the companies in the "Club"—had denied participation in or awareness of the "Club" scheme. App., *infra*, 25a. Nonetheless, during trial, the government presented clear evidence that Cedar Park had participated in the Club scheme before the company went out of business. Two other Club contractors testified that they had been informed by members of organized crime families active in the scheme that Cedar Park was a member. Tr. 6526-6528, 6561-6568, 8176-8177, 8324-8326. That testimony was corroborated by intercepted conversations among the conspirators and a document seized from a Genovese Family location, which indicated that the Family had a ten percent interest in Cedar Park. GX 429; GX 4100, at 4-5. See App., *infra*, 43a-44a.

At trial, Bruno and DeMatteis appeared in response to defense subpoenas, but declined to testify, interposing their Fifth Amendment privilege. App., *infra*, 14a-15a. The government declined to immunize the two witnesses for purposes of trial, whereupon respondents asked that the witnesses' grand jury testimony be admitted under Fed. R. Evid. 804(b)(1), the hearsay exception for the prior testimony of unavailable witnesses (App., *infra*, 15a), or under Fed. R. Evid. 804(b)(5), the "catch-all" exception for statements of unavailable declarants. In response, the government submitted sealed affidavits, in which the government explained that it had "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear to be falsifying their testimony to assist Grand Jury targets or other witnesses." App., *infra*, 19a.

The district court accepted the government's explanation and denied respondents' request to admit the testimony; the court held that, because the government had lacked the same motive to question the two witnesses in the grand jury as it would have had at trial, the earlier testimony was not admissible under Rule 804(b)(1). App., *infra*, 42a-52a. The court stated that the materials submitted by the government "seriously undercut the truthfulness of the grand jury testimony and explain why the prosecutor did not pursue the witnesses, by way of cross-examination, in the grand jury." App., *infra*, 51a. See n.4, *infra*. The court also ruled that, because the testimony lacked a "circumstantial guarantee of trustworthiness," it was not sufficiently reliable to be admitted under Rule 804(b)(5). Tr. 18319.

At the conclusion of trial, respondents were convicted on the RICO counts and the substantive charges arising out of the construction industry fraud. In addition, various defendants were convicted on counts charging labor payoffs, extortion and bid-rigging in the food industry, gambling, and loansharking.[1] Pursuant to the jury's verdict, the court then ordered the forfeiture of various defendants' interests in a number of assets, including large construction and concrete supply companies in New York City. App., *infra*, 9a-11a.

2. The court of appeals reversed all of respondents' convictions, holding that the district court had erred by refusing to admit the Bruno and DeMatteis grand jury transcripts at trial. App., *infra*, 24a. The

[1] Individual defendants were acquitted of mail fraud involving the national elections for the International Brotherhood of Teamsters, as well as the gambling and loansharking charges. App., *infra*, 38a-39a.

court concluded that the grand jury testimony of the two witnesses was "former testimony" under Fed. R. Evid. 801(b)(1), and that the witnesses—by virtue of their invocation of the Fifth Amendment privilege—were "unavailable" to respondents within the meaning of Fed. R. Evid. 804(a)(1). See App., *infra*, 24a. The court then addressed the remaining prerequisite for admission under Rule 801(b)(1)—that "the party against whom the testimony [was] offered" had a "similar motive to develop the testimony by direct, cross, or redirect examination." While agreeing "that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis," App., *infra*, 19a, the court held that "since these witnesses were available to the government at trial through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant." App., *infra*, 21a; see also App., *infra*, 24a. The court concluded: "Since the witnesses were only unilaterally 'unavailable' and could have been subjected to cross-examination by the government [at trial], we will not countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government." App., *infra*, 22a.

Having concluded that the district court erred in excluding the Bruno and DeMatteis grand jury testimony, the court of appeals ruled that, "[i]f this testimony had been believed, it is reasonably probable that the jury would have concluded either that no [concrete] 'club' existed, or at the very least that there was reasonable doubt as to its existence." App., *infra*, 25a. The court therefore held that the error required reversal of the "Construction Case convictions." *Ibid.* Because it regarded the remaining counts and predicate acts as " 'barnacles' on the ship

that was the Construction Case," the court reversed those convictions as well. *Ibid.*[2]

3. After denying the government's petition for rehearing and suggestion for rehearing en banc, the court of appeals on November 6, 1991, modified its opinion (App., *infra*, 40a-41a) by adding a single paragraph. The new portion of the opinion stated that the court had decided that "the testimony of Bruno and DeMatteis [was] available to the government but unavailable to the defendants." App., *infra*, 41a. The court added that it had "not considered in this case, because the issue [was] not before us, whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)." App., *infra*, 41a.

4. On November 20, 1991, the court issued an order modifying its previous denial of rehearing en banc to note that Judges Newman, Kearse, Mahoney, and Walker dissented from that denial. App., *infra*, 55a-56a. In an opinion (App., *infra*, 57a-60a) filed the same day, Judge Newman, joined by the three other dissenting judges, argued that the court's "unprecedented" (App., *infra*, 57a) ruling in this case "departs without justification from the law of this

---

[2] The court of appeals found that respondent Auletta should have been permitted to introduce the government's jury arguments in a related prosecution in which Auletta was not a defendant. See App., *infra*, 33a. The court, however, did not base its reversal of Auletta's conviction on that ruling. App., *infra*, 31a. The court also ruled that the limitations placed by the district court on cross-examination by defendant Ianniello deprived him of his right to present a defense and constituted reversible error. App., *infra*, 26a-30a. Ianniello was not named in the construction charges, and this petition does not address the court of appeals' decision as to him.

Circuit and creates a needless intercircuit conflict." App., *infra*, 60a. Judge Newman stated:

> Putting the Government to the unattractive choice of suffering the admission into evidence of uncross-examined hearsay that it believes is false or else obtaining the opportunity to cross-examine by conferring use immunity not only ignores the settled law in this Circuit and elsewhere on prior statements of witnesses who invoke the privilege against self-incrimination, but also undermines our consistent rulings refusing to impose on the Government an obligation to confer use immunity on defense witnesses.

App., *infra*, 58a-59a. Judge Newman further noted that, despite the panel's disclaimer that it was not deciding any issues arising under hearsay exceptions other than that created by Rule 804(b)(1), "the Government is entitled to be apprehensive that a ruling that a witness is 'available' to the prosecution because use immunity can be conferred might in the future be applied to determine 'availability' beyond Rule 804(b)(1)." App., *infra*, 60a.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case held that Rule 804(b)(1) authorizes the admission against the government of prior testimony by witnesses who are unavailable by virtue of their invocation of the Fifth Amendment privilege. The court of appeals adopted a sweeping rule that a district court must admit such prior testimony, regardless of the extent to which the testimony was accompanied by circumstantial guarantees of trustworthiness, the extent to which the government had any motive to cross-examine the declarant in the prior proceeding, and the extent to which a grant of immunity to the declarant would impede ongoing or planned criminal investigations or prosecutions.

The heart of the court's decision was its holding that the portion of Rule 804(b)(1) upon which the government had relied—the requirement that the party against whom prior testimony is offered must have had a "similar motive" to cross-examine the declarant at the time of the prior testimony—was "irrelevant." App., *infra*, 21a, 24a. The only explanation offered by the court for this holding was that the declarant in such a case is "available" to the government through a grant of immunity. That conclusion is wrong; even if correct, however, it would not justify the court's holding that an express requirement set forth in Rule 804(b)(1) is "irrelevant."

The court of appeals' decision conflicts with decisions of other courts of appeals, which have held that prior testimony by witnesses made "unavailable" by an assertion of privilege may not be admitted against the government absent a showing that the government had both the opportunity and the motive to cross-examine in the prior proceeding. The decision also disregards settled law disfavoring judicial interference in the government's immunity decisions. Especially in organized crime cases, the Second Circuit's holding may require the government, in order to avoid the introduction of unrebutted, perjurious grand jury testimony at trial, to confront the witness in the grand jury with evidence developed in the course of the investigation. To real such evidence at the grand jury stage, however, risks compromising the sources of that evidence and the integrity of the investigation. Because the correct resolution of the

question in this case is important to the criminal justice system, this Court's review is warranted.

1. Rule 804(b)(1) provides that former testimony from an unavailable witness is not excluded as hearsay if it meets a number of requirements: the declarant must have testified "as a witness at another hearing," and "the party against whom the testimony is * * * offered * * * [must have] had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). Former testimony that does not satisfy those requirements may of course be admissible under some other provision of the Federal Rules of Evidence, such as the residual exception to the hearsay rule for unavailable declarants, Fed. R. Evid. 804(b)(5).[3] Yet, if the proponent of the evidence seeks to introduce it under Rule 804(b)(1), the terms of that rule unambiguously provide no basis for admission unless the party against whom it is offered had an opportunity and similar motive to cross-examine the declarant in the prior proceeding.

The court of appeals disregarded the clear terms of Rule 804(b)(1) in ruling that the "similar motive" requirement is "irrelevant," App., *infra*, 21a,

[3] The case-by-case inquiry of Fed. R. Evid. 804(b)(5), which looks to a statement's "circumstantial guarantees of trustworthiness," is the approach courts have generally taken to the introduction of grand jury testimony. See *United States* v. *Fernandez*, 892 F.2d 976, 982-983 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Snyder*, 872 F.2d 1351, 1355 (7th Cir. 1989); *United States* v. *Curro*, 847 F.2d 325, 327 (6th Cir.), cert. denied, 488 U.S. 843 (1988); *United States* v. *Marchini*, 797 F.2d 759, 762-764 (9th Cir. 1986), cert. denied, 479 U.S. 1085 (1987). Cf. *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990). The district court conducted just such an inquiry, and it found that Bruno and DeMatteis's testimony did not satisfy Rule 804(b)(5).

24a, whenever the government could make the declarant available by granting him immunity. That ruling has striking consequences. In this case, for example, the court of appeals did not overturn the district court's finding that the government's motive to cross-examine a witness testifying before a grand jury is "far different" from its motive to cross-examine a trial witness.[4] App., *infra*, 51a. Nor did the court of appeals find fault with the district court's finding, made in response to respondents' argument that the former testimony was admissible under Rule 804(b)(5), that the testimony lacked a "circumstantial guarantee of trustworthiness." See Tr. 18319. See also App., *infra*, 52a ("there is no adequate guarantee of reliability of the grand jury testimony to justify its placement before this jury"). Without suggesting that the district court even had

[4] The government's motive in examining a witness in the grand jury will rarely be "similar" to its motive at trial. The purpose of a grand jury investigation is to determine whether probable cause exists; a grand jury proceeding is "not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). When the government believes a witness has perjured himself in the grand jury, it has little incentive to discredit him on the spot with the vigorous cross-examination that would be appropriate at a trial. By simply excusing the witness and continuing the grand jury's investigation, the government retains the options of prosecuting the witness for perjury or obstruction of justice, or recalling the witness for further examination at a later time when the investigation produces more evidence with which to confront the witness. What is more, because the witness by his testimony has shown himself to be a likely ally of the investigation's targets, to confront him immediately with the evidence indicating his untruthfulness might imperil other witnesses and the ultimate success of the investigation by revealing facts about the probe's direction.

any discretion in ruling on the evidentiary issues under Rule 804(b)(1), the court of appeals held the prior testimony admissible.

The court of appeals attempted to justify its holding by suggesting that a distinction must be drawn between the declarant's unavailability to the proponent of hearsay testimony under Rule 804 and the declarant's unavailability to the opponent of that testimony. App., *infra*, 19a-22a. In this case, the declarants were unavailable to the proponents of the testimony because the declarants had invoked their Fifth Amendment privilege against compulsory self-incrimination. But, according to the court, the declarants were available to the government—the opponent of the testimony—because the government could render them available by granting them immunity.

We disagree with the court of appeals' conclusion that the declarants were available to the government for purposes of Rule 804.[5] But even if the declarants

[5] Rule 804(a)(1) defines "[u]navailability as a witness" to encompass cases in which a declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." Neither that definition nor any other provision of the Federal Rules of Evidence suggests that there is or ought to be any distinction between availability to the proponent of the hearsay evidence and availability to the opponent. Nor is there any basis for treating unavailability due to assertion of a Fifth Amendment privilege differently from unavailability due to other causes. As the court of appeals acknowledged, the Second Circuit itself has "long recognized that 'unavailability' includes within its scope those witnesses who are called to testify but refuse based on a valid assertion of their fifth amendment privilege against self-incrimination." App., *infra*, 16a. Other courts have similarly so held. See, *e.g.*, *United States* v. *Boyce*, 849 F.2d 833, 836 (3d Cir. 1988); *United States* v. *Silverstein*, 732 F.2d 1338 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Zurosky*, 614 F.2d 779, 792 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980); *Witham* v. *Mabry*, 596 F.2d 293 (8th Cir. 1979); see also Notes of Advisory Committee on 1972 Proposed Rules, 28 U.S.C. at 788 ("[s]ubstantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony)").

here could be said to be available to the government (notwithstanding the assertion of their Fifth Amendment privilege), the court's decision would still rest on a substantial misunderstanding of the structure of the rules governing hearsay. Under Rule 802, hearsay is "not admissible except as provided by [the Federal Rules of Evidence]." Rule 803 sets forth the general exceptions to the hearsay rule, and Rule 804 sets forth those exceptions that apply only if the declarant is unavailable as a witness. The only legal effect of a determination that a declarant is available is thus to eliminate the possibility that the hearsay statement could be admitted under Rule 804. There is no basis in the rules for the court of appeals' conclusion that a determination that the declarant is available to the opponent of the testimony justifies admission of the testimony without regard to the specific requirements of the exceptions enumerated in Rule 804(b).[6] Cf. *Bourjaily* v. *United States*, 483 U.S. 171, 178-179 (1987).

[6] The only authority cited by the court of appeals (App., *infra*, 21a) for the proposition that the "similar motive" requirement of Rule 804(b)(1) is "irrelevant" is a passage from a treatise on statutory construction discussing the "well established principle of statutory interpretation that the law favors rational and sensible construction." 2A N. Singer, *Sutherland Statutory Construction* § 45.12, at 54 (4th ed. 1984). We have no quarrel with that principle, although in our view the district court's construction of Rule 804(b)(1)

The logic of the court of appeals' decision would extend to other requirements of Rule 804(b)(1). For the court's reasoning strongly suggests that the "opportunity" prong of Rule 804(b)(1) is as vulnerable as the "motive" prong; if the declarant's "availability" to the government renders the government's motive to cross-examine the declarant in the prior proceeding "irrelevant," it is difficult to see why it would not also render "irrelevant" the government's opportunity to cross-examine him in the prior proceeding. See App., *infra*, 24a ("opportunity and similar motive to develop the testimony * * * is irrelevant"). Nor is there any reason why the government's status as a party in the prior proceeding—also a requirement of Rule 804(b)(1)[7]—should play a role in determining whether the prior testimony can be introduced in evidence by the defendant. In short, the carefully crafted requirements of Rule 804(b)(1)

---

in accordance with its terms was eminently "sensible" and in no sense "irrational." In any event, "[j]udicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner* v. *Asphalt Products Co.*, 482 U.S. 117, 121 (1987) (per curiam); see also *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). As this Court remarked of Rule 52(a) of the Federal Rules of Criminal Procedure, Rule 804(b)(1) "is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988).

[7] See, *e.g.*, *United States* v. *North*, 910 F.2d 843, 906-907 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991); *United States* v. *McDonald*, 837 F.2d 1287, 1291-1293 (5th Cir. 1988); *United States* v. *Kapnison*, 743 F.2d 1450, 1458-1459 (10th Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

simply evaporate under the court of appeals' ruling; despite its express terms, Rule 804(b)(1) becomes a license for admitting, at the defendant's behest, former testimony given in any proceeding by any witness who asserts his Fifth Amendment privilege in the course of a criminal trial.[8]

2. The Second Circuit's decision conflicts with those of at least four other circuits.[9] In *United States*

---

[8] While the court of appeals expressly declined to base its ruling on *Brady* v. *Maryland*, 373 U.S. 83 (1963), it suggested that the government's refusal to acquiesce in the admission of Bruno and DeMatteis's grand jury transcripts might have violated its obligations under that line of cases. App., *infra*, 22a. That reading of *Brady* and its progeny is unwarranted and should pose no bar to review of the panel's evidentiary ruling. While *Brady* requires the government to alert defendants to potential sources of exculpatory evidence known only to the government, it does not make otherwise inadmissible evidence admissible. See *Brady*, 373 U.S. at 88-91 (withheld evidence admissible only on issue of punishment, not guilt, so remand restricted to sentencing; assumes no violation if withheld evidence would not have been admissible); *United States* v. *Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983) (no *Brady* violation from failure to turn over inadmissible evidence). Cf. *United States* v. *Nobles*, 422 U.S. 225, 241 (1975) (Constitution does not give defendant right to present evidence free from legitimate demands of adversary system and does not justify introduction of what might be a half-truth).

[9] The Second Circuit's decision in this case is also at odds with its own decision in *United States* v. *Serna*, 799 F.2d 842 (1986), cert. denied, 481 U.S. 1013 (1987), where, rejecting the claim of a defendant who had sought to introduce the potentially exculpatory testimony of a severed co-defendant in a prior trial, the court held that the testimony was properly excluded under Rule 804(b)(1) because the government lacked "an opportunity and similar motive to cross-examine the witness at the previous trial." 799 F.2d at 849.

v. *Powell*, 894 F.2d 895, cert. denied, 495 U.S. 939 (1990), the Seventh Circuit upheld a trial court's refusal to permit a defendant to introduce his co-defendant's guilty plea allocution, reasoning that the government lacks "the same motive [to examine the declarant] at a plea hearing as it does at other proceedings." *Id.* at 901. The Third Circuit reached the same conclusion in *United States* v. *Lowell*, 649 F.2d 950, 965 (1981). In *United States* v. *Atkins*, 618 F.2d 366, 373 (1980), the Fifth Circuit affirmed a district court ruling that the defendant could not introduce a co-defendant's testimony at a pretrial hearing because the government lacked a motive to cross-examine the co-defendant at that hearing on the relevant issue. Finally, in *United States* v. *North*, 910 F.2d 843 (1990), cert. denied, 111 S. Ct. 2235 (1991), the D.C. Circuit held that the trial court had properly excluded Admiral Poindexter's prior immunized testimony under Rule 804(b)(1). The court held, first, that the Independent Counsel and Congress were not the same party, thus leading to the conclusion that the Independent Counsel had had no "opportunity" to develop Poindexter's congressional testimony. Second, the court held that, "even if Congress and the [Independent Counsel] were the same party," Poindexter's prior immunized testimony could not be introduced by Colonel North because Poindexter's congressional interrogators had lacked a "similar motive" at the hearings. 910 F.2d at 906-908. In each of these cases, the court relied on Rule 804(b)(1) to preclude a defendant from introducing prior testimony by a declarant who was rendered "unavailable" solely by an invocation of the Fifth Amendment. In none was the government's ability to immunize the declarant used as a basis for disregarding the government's lack of motive to cross-examine in the prior proceeding.[10]

Although courts on several occasions have either held or suggested that prior grand jury testimony by a witness thereafter made "unavailable" by invocation of his Fifth Amendment privilege may be admitted against the government at trial under Rule 804(b)(1), each of those cases rested upon findings that the government had, on the facts of those cases, both a "similar motive" and an "opportunity" to cross-examine the witness in the grand jury. See *United States* v. *Miller*, 904 F.2d 65, 68 & n.3 (D.C. Cir. 1990) (government had same motive and opportunity in grand jury as at trial); *United States* v. *Klauber*, 611 F.2d 512, 516-517 (4th Cir. 1979) (suggesting in *dicta* that it could "well imagine" that unavailable witness's prior grand jury testimony "might" have been admitted under Rule 804(b)(1) as having been given in a proceeding where the government "would have had an opportunity and similar motive to develop the testimony by direct examination"), cert. denied, 446 U.S. 908 (1980); *United States* v. *Henry*, 448 F. Supp. 819, 821 (D.N.J. 1978) (assuming without discussion that the government had a similar motive and opportunity to cross-examine in grand jury, but limiting its ruling to "the circumstances of this case * * * without in any way implying any broad or general rule applicable to all

[10] None of the decisions cited above involved prior testimony in the grand jury, and only *United States* v. *North* involved prior testimony given under a grant of immunity. Neither of those factors, however, was critical to the Second Circuit's decision, which was based on the government's ability to make witnesses "available" through immunization, and would extend to the factual settings in each of the other cited decisions.

instances"). Cf. *United States* v. *Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984) (admission of non-testifying declarant's prior grand jury testimony against the government is "a matter for the trial judge's discretion, to be exercised on the basis of his evaluation of the realities of cross-examination and the motive and interest with which the government carried out the prior examination"; no indication of why declarant was unavailable); *United States* v. *Young Bros.*, 728 F.2d 682, 691 (5th Cir.) (while noting that the government had an "opportunity to question the witness fully" in the grand jury, without addressing whether the government had motive to do so, court finds no need to resolve issue because any error would have been harmless), cert. denied, 469 U.S. 881 (1984).

The decision in this case departs, in a critical respect, from each of the decisions cited above. In this case, the Second Circuit declined to find that the "motive" requirement of Rule 804(b)(1) was satisfied, and in fact specifically noted that the government "may have had no motive." App., *infra*, 19a. As Judge Newman recognized in dissenting from the denial of rehearing en banc (App., *infra*, 58a), no other court has read the motive requirement out of the rule, as the Second Circuit has plainly done in this case.

3. In addition to misapplying Rule 804(b)(1), the Second Circuit's decision threatens to bring confusion to other evidentiary principles as well. To be sure, in the November 6 amendment to its opinion, the court stated that it had not "considered * * * whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)." App., *infra*, 41a. Notwithstanding that disclaimer, however, there is no

basis for distinguishing between "unavailability" for purposes of Rule 804(b)(1) and "unavailability" for purposes of other provisions of Rule 804(b). Cf. App., *infra*, 60a (Newman, J., dissenting from denial of rehearing en banc). Consequently, the court's ruling in this case could affect the construction of each of the hearsay exceptions under Rule 804(b).

For example, courts have uniformly understood Rule 804(b)(3) to permit the government to introduce statements against penal interest upon a showing that the declarant has been rendered "unavailable" by an invocation of the Fifth Amendment and that the other requirements of Rule 804(b)(3) have been met. See *United States* v. *Garcia*, 897 F.2d 1413, 1420-1421 (7th Cir. 1990); *United States* v. *Boyce*, 849 F.2d 833, 835-837 (3d Cir. 1988); *United States* v. *Briscoe*, 742 F.2d 842, 846-847 (5th Cir. 1984); see also *United States* v. *Williams*, 927 F.2d 95, 98-99 (2d Cir.), cert. denied, 112 S. Ct. 307 (1991); *United States* v. *Winley*, 638 F.2d 560, 562 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982). In none of those cases was the government's ability to make a declarant "available" through a grant of immunity found to have any impact on the admissibility of the testimony.[11]

---

[11] The Second Circuit's creation of an immunity exception to the definition of unavailability is also inconsistent with well-settled law that, where a potential witness has asserted his Fifth Amendment privilege, the defendant is not entitled to a "missing witness" instruction licensing the inference that the potential witness's testimony would be adverse to the government. That rule is based on the premise that a potential witness who has asserted his Fifth Amendment privilege is equally unavailable to both parties, regardless of the fact that the government has the power to grant him immunity and thus make him "available." See *United States* v. *St. Michael's Credit Union*, 880 F.2d 579, 597-598 (1st Cir. 1989); *United States* v. *Brutzman*, 731 F.2d 1449, 1454 (9th

The general refusal, prior to the Second Circuit's decision in this case, to modify the Rule 804(b) hearsay exceptions as applied to the government in cases in which the declarant asserts his Fifth Amendment privilege rests not merely on the plain language of Rule 804(a), but also on the sound principle that the Executive Branch should not be forced to grant immunity to a defendant's confederates as the price of having the courts apply the rules of evidence according to their terms. See *United States* v. *Georgia Waste Systems, Inc.*, 731 F.2d 1580, 1582 (11th Cir. 1984); *United States* v. *Weiner*, 578 F.2d 757, 771 & n.12 (9th Cir.), cert. denied, 439 U.S. 981 (1978); *United States* v. *Lang*, 589 F.2d 92, 95-96 (2d Cir. 1978). That principle in turn reflects the general, and sound, reluctance of courts to grant immunity or compel the government to seek an order of immunity for defense witnesses. See, *e.g.*, *United States* v. *Mitchell*, 886 F.2d 667, 669-670 (4th Cir. 1989); *United States* v. *Doddington*, 822 F.2d 818, 821 & n.1 (8th Cir. 1987); *United States* v. *Williams*, 809 F.2d 1072, 1083 (5th Cir.), cert. denied, 484 U.S. 896 (1987); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987). The Second Circuit itself has cogently summarized the rationale for that rule:

> In addition to ensuring that prosecutorial decisions concerning whom to prosecute and what evidence to present at a criminal trial will not be

---

Cir. 1984); *United States* v. *Flomenhoft*, 714 F.2d 708, 713-714 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *United States* v. *Simmons*, 663 F.2d 107, 108 (D.C. Cir. 1979); *United States* v. *Stulga*, 584 F.2d 142, 145-146 (6th Cir. 1978); *United States* v. *Chapman*, 435 F.2d 1245, 1247-1248 (5th Cir. 1970), cert. denied, 402 U.S. 912 (1971). See generally *Graves* v. *United States*, 150 U.S. 118, 121 (1893).

> lightly interfered with by the judiciary, it reduces the possibility of cooperative perjury between the defendant and his witness. A person suspected of crime should not be empowered to give his confederates an immunity bath.

Blissett v. *LeFevre*, 924 F.2d 434, 441-442 (2d Cir.) (internal quotation marks omitted), cert. denied, 112 S. Ct. 158 (1991).

In suggesting that "the government made Bruno and DeMatteis unavailable to the defense by refusing to immunize them at trial," App., *infra*, 23a, the Second Circuit ignored these considerations. Even when the government has found it necessary to immunize witnesses in the grand jury—as it did here—it should not be forced to permit defendants who have conspired with those witnesses to engineer a broader grant of immunity at trial that would provide substantial protection to the witnesses against prosecution for their grand jury perjury and for any other crimes disclosed by their trial testimony. Although, in the grand jury, the government can carefully limit its questioning to matters critical to its investigation —and terminate the questioning at any point—the examination and cross-examination of such witnesses at trial is not subject to similar control, and may result in an effective "immunity bath" for witnesses who would otherwise be prospective subjects of separate prosecution.

4. As Judge Newman recognized, the court of appeals' decision will undoubtedly have a disruptive effect on grand jury investigations in which the government has subpoenaed the target's allies and associates to testify—under grant of immunity or otherwise—and the government believes they have perjured themselves. See App., *infra*, 59a. (New-

man, J., dissenting from denial of rehearing en banc). If the government wishes to avoid immunizing those witnesses at trial but at the same time seeks to prevent the admission at trial of unimpeached grand jury testimony the government believes to be perjurious, the only course left open by the court's decision is for the government to conduct a more vigorous examination of the witnesses before the grand jury. Pursuing such a course, however, could threaten the security of the grand jury's investigation. Especially in an organized crime investigation, confronting a target's ally with evidence obtained from other sources risks compromising those sources and impeding the progress of the investigation. After the Second Circuit's decision, however, a prosecutor may well be forced to subordinate the need to protect the security of the investigation to the need to ensure that testimony rife with perjury not go to a future trial jury effectively unchallenged.

Another practical problem created by the Second Circuit's decision is likely to arise frequently. When an ally of the defendant testifies in the grand jury during the early stages of an investigation, the government may have insufficient knowledge of the relevant facts to conduct effective cross-examination in the grand jury (or even to be aware that the witness has committed perjury). In such situations, the only choices left to the government under the Second Circuit's rule are (1) to immunize the witness at trial, thereby obstructing the prosecution of a possible co-conspirator, or (2) to acquiesce in the admission of the perjury at trial, where the jury might well give it special weight for having been elicited by the government before a grand jury, under oath, and without impeachment. Because the court of appeals' decision represents an unwarranted intrusion into the

government's prosecutorial discretion and a serious obstacle to the ability of trial courts to exclude unreliable evidence, and because the decision is inconsistent with well-settled law in other circuits, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DANIEL C. RICHMAN
Attorney

NOVEMBER 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 1586-1601, Dockets 88-1464, -1470, -88-1474, -1477, -1547; 90-1291, -1292, -1296, -1297, -1301, -1311, -1312 and -1351

UNITED STATES OF AMERICA, APPELLEE

v.

ANTHONY SALERNO, a/k/a "FAT TONY," VINCENT DI NAPOLI, a/k/a "VINNIE," LOUIS DI NAPOLI, a/k/a "LOUIE," MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE," JOHN TRONOLONE, a/k/a "PEANUTS," MILTON ROCKMAN, a/k/a "MAISHE," NICHOLAS AULETTA, a/k/a "NICK," EDWARD J. HALLORAN, a/k/a "BIFF," ALVIN O. CHATTIN, a/k/a "AL," RICHARD COSTA, a/k/a "RICHIE," and ANIELLO MIGLIORE, a/k/a "NEIL," DEFENDANTS

MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE," VINCENT DI NAPOLI, a/k/a "VINNIE," LOUIS DI NAPOLI, a/k/a "LOUIE," NICHOLAS AULETTA, a/k/a "NICK," EDWARD J. HALLORAN, a/k/a "BIFF," ANIELLO MIGLIORE, a/k/a "NEIL," ANTHONY SALERNO, a/k/a "FAT TONY," and ALVIN O. CHATTIN, a/k/a "AL," DEFENDANTS-APPELLANTS

Argued May 8, 1991

Decided June 28, 1991

Before PRATT, MINER, and ALTIMARI, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

I. INTRODUCTION

For better or for worse, our circuit in recent years seems to have been the locus for "megatrials". *See, e.g., Polizzi v. United States*, 926 F.2d 1311, 1313 (2d Cir.1991) ("This appeal stems from what can only optimistically be called an aberration in the federal judicial system—the RICO megatrial"); *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989) (thirty-five defendants charged in RICO indictment, twenty-one defendants tried in joint trial lasting over seventeen months and involving roughly 275 witnesses), *cert. denied*, —— U.S. ——, 110 S. Ct. 1138, 107 L.Ed.2d 1043 (1990); *Proctor & Gamble Co. v. Big Apple Indus. Bldgs., Inc.*, 879 F.2d 10, 12 (2d Cir.1989) ("The [RICO pattern] problem is of serious consequence because a RICO trial often becomes a 'megatrial' with large numbers of unrelated defendants—charged with unconnected wrongs—tried together under the rubric of a single conspiracy"), *cert. denied*, ——U.S. ——, 110 S.Ct. 723, 107 L.Ed 2d 743 (1990).

Defendants are often heard to complain that the government benefits from the ambiguity and confusion which accompanies these gargantuan indictments; despite the complaints, we have responded, sometimes grudgingly, by affirming the lion's share of the convictions in spite of our concerns about the unruliness of such cases. *See, e.g., Casamento*, 887 F. 2d at 1151-53.

Similarly, defendants often complain that, because of the diversity of proof admissible in such an enormous case, they suffer not only from "prejudicial spillover", such as occurs "where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence relating to another," *United States v. Miley*, 513 F.2d 1191, 1209 (2d Cir.) (Friendly, J.), *cert. denied sub nom. Goldstein v. United States*, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 62 (1975), but also from prejudice transferred across the line separating conspiracies, or defendants, "so great that no one really can say prejudice to substantial right has not taken place." *Kotteakos v. United States*, 328 U.S. 750, 774, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946).

This case—an enormous one involving bid-rigging in the New York City concrete industry, with numerous small, tangentially-related counts attached like barnacles—creates a problem different from, but related to, the concept of prejudicial spillover: that of "spillover taint". Serious error that occurred during this enormous trial requires the reversal of that portion of the case representing the majority of the convictions. This error, when combined with the aspects of the trial that raise serious questions of fairness, leads us to the conclusion that *all* of the convictions must be reversed. After reversing what was by far the largest portion of the indictment, we cannot really say that prejudice to substantial right would not take place if we left only a few of the collateral convictions intact. The likelihood of spillover taint running from the erroneously-achieved convictions to the remaining few is enough to undermine our confidence in the accuracy of all of the guilty verdicts. We therefore reverse the convictions of all appealing defendants and remand for further proceedings in the district court.

II. FACTS AND BACKGROUND

The history of this case is long and complex. At this point we set forth its general background and outline; further factual details will be discussed later in the opinion where pertinent to specific issues.

A. *The Commission Case*

Well before the indictment in this case was handed down, a much shorter RICO trial (eleven weeks) involving many of the same facts was held in the Southern District of New York. This trial, which came to be known as the "commission case", alleged a RICO enterprise known as the "commission" of La Cosa Nostra:

> The indictment alleged, and substantial evidence at trial established, that the Commission has for some time acted as the ultimate ruling body over the five La Cosa Nostra families in New York City and affiliated families in other cities. The general purpose of the Commission is to regulate and facilitate the relationships between and among the several La Cosa Nostra families, and more specifically to promote and coordinate joint ventures of a criminal nature involving the families, to resolve disputes among the families, to extend formal recognition to "bosses" of the families and on occasion resolve leadership disputes within a family, to approve the initiation or "making" of new members of the families, and to establish rules governing the families, officers and members of La Cosa Nostra. There are five New York families (*i.e.*, the Genovese, Gambino, Colombo, Lucchese and Bonanno families). Since the late 1970s, the Commission was controlled by

> the bosses of four of those families, often acting through their deputies.

United States v. Salerno, 868 F.2d 524, 528 (2d Cir. 1989).

The government charged, as predicate racketeering acts in the commission case, three general commission schemes. One alleged scheme was the concrete contractors' "club":

> The first scheme, an extortion and labor bribery operation known as the "Club," involved all appellants except Indelicato. The Club was an arrangement between the Commission, several concrete construction companies working in New York City, and the District Council, a union headed by Scopo. The Club was a cooperative venture among the Families, and the Commission set rules and settled major disputes arising out of the scheme. The rules of the Club were: only such construction companies as the Commission approved would be permitted to take concrete construction jobs worth more than two million dollars in New York City; any contractor taking a concrete job worth more than two million dollars would be required to pay the Commission two percent of the construction contract price; the Commission would approve which construction companies in the Club would get which jobs and would rig the bids so that the designated company submitted the lowest bid; the Commission would guarantee "labor peace" to the construction companies in exchange for compliance with the rules of the Club; and the Commission would enforce compliance by threatened or actual labor unrest or physical harm, even to the point of

> driving a company out of the concrete business. According to the government, seven concrete construction companies were participants in this extortionate scheme.

Id. at 529.

There was an interesting relationship between the commission case and the timing of the indictments in the case before us. The final (third superseding) indictment in the commission case was filed on March 13, 1986. Eight days later, the initial indictment was filed in this case (the "club case"). The trial of the commission case began on September 8, 1986. Ten days later, the first superseding indictment in the club case was filed. The jury returned its verdicts against the commission defendants on January 13, 1987. Two days later, the government filed its second superseding indictment in the club case.

After an *in banc* hearing as to one commission case defendant, 865 F.2d 1370 (2d Cir.1989), we affirmed all of the convictions, with the exception of one RICO count against one defendant, which we reversed.

B. *The indictment*

On April 7, 1987, a grand jury for the Southern District of New York charged eleven defendants (Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, Aniello Migliore, Matthew Ianniello, John Tronolone, Milton Rockman, and Richard Costa) in a 35-count third superseding indictment. The gravamen of the indictment was that, from 1970 to the date of the indictment, the defendants conspired to and did engage in a racketeering enterprise known as the Genovese Organized Crime Family of La Cosa Nostra (colloquially, the "Genovese family" of "the Mafia").

While engaged in this enterprise, the defendants allegedly committed and conspired to commit numerous crimes, which were charged in the indictment as predicate acts.

Count One charged all eleven defendants with conspiring to conduct the Genovese family's affairs through a pattern of racketeering activity (which consisted of 41 separate predicate acts), in contravention of the RICO conspiracy statute, 18 U.S.C. § 1962(d). The separately enumerated predicate acts charged:

> 1-16 and 19-22: fraud in the concrete construction industry (the "Construction Case")
>
> 17-18: fraud against the International Brotherhood of Teamsters (the "Teamster Case")
>
> 23: illegal labor payoffs
>
> 24: attempted extortion of Andrew Giordano
>
> 25-36: extortion and conspiracy to extort Marathon Enterprises, Inc., extortion of the Player's Club Restaurant, fraud against the New York Zoological Society (collectively, the "Food Case")
>
> 37-40: illegal numbers and bookmaking businesses, and extortionate collection and extension of credit (collectively, the "Rackets Case")
>
> 41: conspiracy to murder John Simone.

Various defendants were charged in each predicate act, but no one defendant was charged with every predicate act, nor were all eleven defendants charged in any one predicate act.

Count Two of the indictment charged all eleven defendants with the substantive crime of conducting

and participating in the activities of the Genovese family in violation of 18 U.S.C. § 1962(c) (the "substantive RICO count").

Counts Three through Thirty-Five charged various of the defendants with mail fraud, conspiracy, extortion, illegal gambling, and extortionate credit extension; these substantive charges corresponded to most of the predicate acts charged in Counts One and Two. The scope of the indictment, and the verdicts returned, are illustrated in the table which is attached as an Appendix to this opinion.

The Appendix illustrates that all defendants were charged with the RICO conspiracy and RICO substantive counts contained in Counts One and Two of the indictment. In addition, it shows that the indictment breaks down into one huge case (the Construction Case, charging seven defendants in sixteen counts); one eleven-count case (the Food Case, in which Costa was charged in all eleven counts, Salerno in nine, and Ianniello in only one); two small cases (the Teamster Case, charging three defendants in two counts; and the Rackets Case, charging Salerno in four counts and Louis DiNapoli in one); and allegations of three additional racketeering acts: illegal labor payoffs (charging only Salerno and Ianniello), attempted extortion of Andrew Giordano (charging only Salerno and Ianniello), and conspiracy to murder John Simone (charging only Salerno and Tronolone).

The Appendix further shows that Ianniello, Tronolone, and Rockman each were charged in only a few counts, while the defendants in the Construction Case represented the major targets of the indictment. Obviously, they were the major targets at the trial, as well.

C. *The Trial*

Trial of this matter began on April 6, 1987, and concluded thirteen months later, on May 4, 1988. Most of the trial was devoted to the prosecution and defense of the Construction Case. The government presented evidence that the Construction Case defendants had participated in a scheme to rig the contracts for concrete superstructure work on high-rise buildings in Manhattan where the value of the concrete work was over $2 million. According to the government, Salerno, along with Vincent DiNapoli, orchestrated the scheme. By establishing control over two essential elements of Manhattan-area concrete contractors' work—labor and ready-mix concrete—Salerno and Vincent DiNapoli were able to keep all of the work on these projects within a select group of contractors, called the "Club". The Genovese family allegedly allocated the jobs among these companies by rigging the bids that they submitted. The Genovese family also allegedly controlled the labor market through corrupt union officials, and controlled the ready-mix market by entering into an alliance with defendant Halloran, to whom the Genovese family granted a monopoly for supplying concrete in Manhattan. The Genovese family profited from this scheme because, according to the government, the owner/developers and construction managers paid to it a two percent surcharge on all concrete jobs performed by Club members.

D. *The Verdicts*

All eight appealing defendants, as well as defendant Costa (who did not appeal his convictions), were convicted of Counts One and Two, the RICO conspir-

acy and substantive RICO counts. Salerno, both DiNapolis, Auletta, Halloran, Chattin and Migliore were all convicted of Counts Three through Eighteen (and found to have committed racketeering acts 1-16), which was the Construction Case. In addition, Halloran was found to have committed four construction-related racketeering acts (predicate acts 19-22) in relation to the RICO conspiracy count, but only two of those same acts (19 and 20) in relation to the substantive RICO count.

The Teamster Case, which was premised on allegations of fraudulent intervention in the elections of Roy L. Williams and Jackie Presser as general presidents of the International Brotherhood of Teamsters, resulted in verdicts of not guilty for all three charged defendants, Salerno, Tronolone, and Rockman. Salerno and Ianniello were, however, found to have committed the related predicate act 23, involving the illegal labor payoffs. The jury was unable to agree on the predicate act involving the alleged extortion of Giordano, which charged only Salerno and Ianniello.

The Food Case alleged extortion of Marathon Enterprises (a New Jersey producer of hot dogs and hot dog buns) and the Player's Club Restaurant, bid-rigging on food service contracts at the Bronx Zoo, and illegal payments to an AFL-CIO official. The Food Case resulted in convictions on all counts involving Salerno and Costa, who were charged in Counts Twenty-One through Thirty-One (and predicate acts 25-36). Ianniello, who was charged in Count Twenty-One (and predicate act 25) along with Salerno and Costa, was likewise found guilty.

On the Rackets Case, which charged Salerno and Louis DiNapoli with running an illegal numbers business and Salerno with illegal bookmaking and extortionate credit practices, the jury found that both Salerno and Louis DiNapoli had committed predicate act 37, involving gambling and loan sharking. Salerno was also convicted of Count Thirty-Two, which corresponded to predicate act 37, but Louis DiNapoli was only charged with the predicate act, not the formal Count. The jury returned verdicts of not guilty on the remainder of the Rackets Case.

Neither Salerno nor Tronolone was found to have conspired to murder John Simone.

The jury further returned forfeiture verdicts against Salerno, Vincent DiNapoli, Auletta, and Halloran, awarding to the government Salerno's interests in S & A Concrete Company and its affiliates from November 1981 through the end of 1984; his interests in Glen Island Casino; and payments from Marathon Enterprises, Inc. totalling $155,000. The jury forfeited to the government Vincent DiNapoli's interests in S & A and the Glen Island Casino. Additionally, the jury ordered that Auletta's interests in S & A Concrete and its affiliates, as well as Big Apple Concrete, be forfeited to the government, and the jury further awarded to the government Auletta's proceeds from the sale of certain property. Finally, the jury ordered forfeited Halloran's interests in Big Apple and Certified Concrete Co., Inc.

E. *The Sentences*

Judge Lowe sentenced Salerno to 70 years in prison and ordered him to pay a fine of $376,000 plus twice the gross profits of his racketeering activities. Vincent DiNapoli was sentenced to 24 years in prison and fined $266,000 plus twice his gross racketeering profits. Migliore received the same sentence and fine as Vincent DiNapoli. Louis DiNapoli was sentenced to 14 years' imprisonment and fined $266,000 plus

twice his gross racketeering profits. Ianniello and Halloran were each sentenced to 13 years in prison; Halloran was fined $266,000 plus twice his gross racketeering profits, while Ianniello was fined $505,000. Chattin was sentenced to six years in prison and fined $16,000. Costa was sentenced to nine years' imprisonment and ordered to pay a fine of $297,000.

F. *The Motions for New Trial*

After the jury had rendered its verdicts, but before sentencing, Salerno—joined by all other convicted defendants—filed a motion for a new trial and for the recusal of Judge Lowe. They claimed to have discovered evidence that Judge Lowe and the United States Deputy Marshal assigned to her courtroom had separately engaged in *ex parte* contacts with the jury during deliberations. Judge Lowe allegedly informed the jury that they had to produce a unanimous verdict, and that no mistrials would be tolerated. The marshall was alleged to have told the foreperson of the jury that "the people outside are getting tired and restless, and if we don't hurry up and make some type of decision, we are going to have to listen to over one hundred audio tapes." He was also alleged to have told another juror," [Y]ou got a pretty bad attitude." The factual allegations are discussed more extensively in Chief Judge Brieants' opinion, 740 F.Supp. 171 (S.D.N.Y. 1990). Based on the written submissions and oral argument, but without conducting an evidentiary hearing, Judge Lowe, in a lengthy opinion reported at 698 F.Supp. 1109 (S.D.N.Y.1988), denied the motion for a new trial as well as the motion for recusal and proceeded to sentencing.

When the defendants appealed, we vacated Judge Lowe's order denying the new trial motion and remanded with specific instructions for a factual inquiry into the defendants' allegations. *United States v. Ianniello*, 866 F.2d 540 (2d Cir. 1989).

On the remand, Chief Judge Brieant conducted the factual inquiry, and once again denied the defendants' motion for a new trial, stating: "On the totality of the evidence this Court concludes that there is no credible evidence that either Judge Lowe or Deputy Marshal Perrine interfered with the deliberations of the jurors or attempted in any way to influence or coerce the trial jury." *United States v. Ianniello*, 740 F.Supp. 171, 195 (S.D.N.Y.1990).

From the judgments of conviction as well as Chief Judge Brieant's denial of their motion for a new trial, eight defendants appeal.

III. DISCUSSION

This megatrial resulted in a mega-appeal, in which the eight appealing defendants filed separate briefs, raising collectively at least sixteen distinct issues. The appellants did not simply repeat each others' arguments; instead, seven of them presented at least one separate argument and in addition adopted by reference the points raised in the others' briefs, pursuant to Fed.R.App.P. 28(i). The government responded with a 300-page typeset brief, addressing the sixteen arguments point-by-point.

Oral argument was a similar ordeal, in which we departed from our usual practices in two ways. First, we allotted for oral arguments two hours (and ended up using three), where we normally allow no more than fifteen minutes per side. Second, in view of the unusual number of significant issues raised, we allowed each advocate for each defendant to make his argument, followed immediately by the government's

rebuttal argument. We heard six different advocates for the appellants, while two assistant United States Attorneys divided the chores for the government. Our task was informed by fine briefing and extraordinary oral advocacy on all sides. Their extensive efforts to cope with a case of this magnitude were commendable.

Although sixteen issues were raised, we have concluded that one of the claimed errors—the erroneous exclusion from evidence of certain grand jury testimony—so tainted the entire trial that reversal and a new trial is required for all eight appealing defendants. It is necessary, in addition, to comment on three other issues—Ianniello's proffered bias defense, evidence of inconsistent positions taken by the government against Auletta, and the serious allegations of misconduct—in order to be sure these problems do not arise again.

A. *The Grand Jury Testimony of Bruno and DeMatteis*

1. Background

Pursuant to its obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the government informed defendants Vincent and Louis DiNapoli that Pasquale J. Bruno and Frederick DeMatteis had testified under immunity before the grand jury, and that counsel for the defendants might wish to speak to those witnesses, as they were sources of potentially exculpatory evidence. Both Bruno and DeMatteis were principals in Cedar Park Concrete Construction Corporation ("Cedar Park"), one of the companies alleged to have been a member of the "Club" of concrete contractors.

At trial, counsel for the defendants called Bruno and DeMatteis to the stand, whereupon each asserted

his fifth amendment privilege against self-incrimination. Although requested to do so by defense counsel, the government refused to immunize Bruno and DeMatteis. Defendants then moved the district court to direct the government to furnish copies of the grand jury minutes so that they could introduce the witnesses' grand jury testimony under Fed.R.Evid. 804 (b) (1), the "former testimony" exception to the hearsay rule for unavailable declarants.

After examining privately the grand jury minutes as well as other materials supplied by the government (all of which were transmitted to the district court under seal), and hearing *in camera* arguments from the government about the content and admissibility of the grand jury testimony, Judge Lowe denied the motion. She reasoned that the government's motive to examine a grand jury witness is "far different from the motive of a prosecutor in conducting the trial"; thus, she held, the grand jury minutes were inadmissible under rule 804(b)(1).

2. Federal Rule of Evidence 804(b)(1)

Federal Rule of Evidence 804(b)(1) provides, in pertinent part:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> 1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding * * *, if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

This former testimony exception to the hearsay rule is arguably "the strongest hearsay", because of all the ideal conditions for the giving of testimony (oath, opportunity for cross-examination, presence of trier of fact, and presence of opponent), only the latter is absent. Fed.R.Evid. 804 advisory committee's note. *See E. Cleary, McCormick on Evidence*, § 245, at 726-29 (3d ed. 1984). *See also Weissenberger, The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 Tul.L.Rev. 335, 344 (1984) (former testimony exception based on necessity, accuracy, and fairness to party against whom offered). We must keep these considerations in mind as we interpret the rule.

a. Declarant Unavailable?

Federal Rule of Evidence 804(a)(1) provides:

> (a) Definition of unavailabilty. "Unavailability as a witness" includes situations in which the declarant—
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; * * *.

We have long recognized that "unavailability" includes within its scope those witnesses who are called to testify but refuse based on a valid assertion of their fifth amendment privilege against self-incrimination. *See, e.g., United States v. Salvador*, 820 F.2d 558, 560 (2d Cir.), *cert. denied*, 484 U.S. 966, 108 S.Ct. 458, 98 L.Ed.2d 398 (1987); *United States v. Rodriguez*, 706 F.2d 31, 40 (2d Cir.1983); *United States v. Beltempo*, 675 F.2d 472, 480 (2d Cir.), *cert. denied*, 457 U.S. 1135, 102 S.Ct. 2963, 73 L.Ed.2d 1353 (1982).

Thus, it is without question that once they were subpoenaed and had invoked their fifth amendment privilege, both Bruno and DeMatteis became "unavailable" to the defendants, who could not compel them to testify.

However, the government could compel that testimony through a grant of use immunity. The "unavailability" of a witness under rule 804 depends on the situation of the parties and their relationship to the witness. *See* J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 804(a)[01], at 804-36 (1990) ("the crucial factor is not the unavailability of the witness but the unavailability of his testimony."). "A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the *proponent* of a statement for the purpose of preventing the witness from attending or testifying." Fed.R. Evid. 804(a) (emphasis added). In such a case, the witness is not "unavailable" to the proponent, who is thereby prevented from invoking rule 804(a). That same principle of adversarial fairness should prevent the *opponent* of a hearsay declaration from invoking the protections of rule 804(b)(1) when the declarant, although unavailable to the *proponent*, is available to the *opponent* of the declaration. "If the witness has been by the *opponent procured* to absent himself, this ought of itself to justify the use of his deposition or former testimony * * *." 5 J. Wigmore, *Evidence in Trials at Common Law* § 1405, at 218-19 (Chadbourn rev. 1974) (emphasis in original). In short, the testimony of Bruno and DeMatteis was available to the government but unavailable to the defendants.

b. Testimony given as a witness at another hearing of the same or another proceeding?

Grand jury testimony, doubtlessly, is "former testimony" under rule 804(b)(1). *See United States v. Vigoa*, 656 F.Supp. 1499, 1505 n. 5 (D.N.J. 1987) ("It is undeniable * * * that grand jury testimony constitutes 'former testimony' specifically covered by Rule 804(b)(1)"), *aff'd*, 857 F.2d 1467 (3d Cir. 1988) (mem.); *cf. United States v. Salim*, 855 F.2d 944, 952-53 (2d Cir.1988) (oath or affirmation and verbatim translation satisfy "former testimony" requirement); Fed.R.Evid. 804 advisory committee's note. Here, both oath and verbatim transcription were present in the grand jury testimony: both witnesses were sworn, and the proceedings were transcribed by a certified shorthand reporter.

c. Opportunity and similar motive?

This is not the first time that the grand jury testimony of Bruno and DeMatteis has been the subject of dispute in this court. In the commission case, one of the appellants also argued that the failure to turn over the grand jury testimony of Bruno and DeMatteis violated both *Brady* and Fed.R.Evid. 804(b)(1). The government there had taken the position that it would produce the grand jury minutes only if and when Bruno was called as a witness. 868 F.2d at 542 n. 7. We held that its position "does not violate *Brady*". *Id. See also* Brief for Government at 188-90, *United States v. Salerno*, 868 F.2d 524 (2d Cir. 1989) (No. 87-1075). We further held that since the appellant had not called the declarants as witnesses to permit them to refuse to testify at the trial, he had

failed to show that either declarant was "unavailable". *Salerno*, 868 F.2d at 542 & n. 8.

Here, in contrast, the defendants called both men to the stand out of the jury's presence and, when asked a series of questions, both men invoked the fifth amendment in response to each question. Thus, the defendants filled in the gap that had defeated the appellant in the commission case. But to keep the trial jury from hearing the grand jury testimony of these two witnesses, the government raised still another objection: that it did not have a "similar motive" to develop the witnesses' testimony before the grand jury as required under rule 804(b)(1). Since all other requirements for admission of the testimony were satisfied, this similar-motive contention becomes the focus of the dispute on this appeal.

The government vigorously contends that they lacked a "similar motive" to develop the testimony in front of the grand jury, since they believed that the witnesses had committed perjury therein. By *ex parte* affidavits filed under seal, the government maintained that they have "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear to be falsifying their testimony to assist Grand Jury targets or other witnesses." The government argued, and the district court agreed, that the government's motive in developing testimony in front of a grand jury is so different from the motive at trial that the rule 804(b)(1) hearsay exception does not apply. Accordingly, the district court refused the defendants' offer of the grand jury testimony of Bruno and DeMatteis.

While we agree that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis, we

do not think that is sufficient to exclude the evidence at trial. The "similar motive" requirement of rule 804(b)(1) protects the party to whom the witness is "unavailable" in order to accord that party some degree of adversarial fairness, thereby assuring that the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do at trial if the witness were available to be examined by that party. When the declarant is unavailable to the party against whom the testimony is being offered, the "similar motive" requirement not only ensures that the right of cross-examination is preserved, but also ensures that the party against whom the testimony is offered has been afforded a fair chance to seek the truth, and is not blindsided at trial by the hearsay testimony. *See United States v. Young Bros., Inc.*, 728 F.2d 682, 691 (5th Cir.) ("This concern is not present in this case because it was the party offering the testimony, the appellant, who had not had the opportunity to cross-examine."), *cert. denied*, 469 U.S. 881, 105 S.Ct. 246, 83 L.Ed.2d 184 (1984); *United States v. Vigoa*, 656 F.Supp. at 1505 ("By conditioning admission upon proof that party against whose interest the testimony is offered was adequately represented during the development of testimony, Rule 804(b)(1) incorporates considerations of adversarial fairness into the evidentiary analysis.").

Had Bruno and DeMatteis been, for example, ill or dead at the time of trial (and therefore, under rule 804(a)(4), "unavailable" to *either* side), the district court would have properly inquired whether the government had a "similar motive" to examine them in the grand jury before allowing their testimony before the grand jury to be admitted under rule 804(b)(1),

because neither the government nor the defendant would be able to examine the witness at trial. But since these witnesses were available to the government at trial, through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant. When the reason for the requirement evaporates, so does the requirement. *See* 2A *N. Singer, Sutherland Statutory Construction* § 45.12, at 54-55 (4th ed. 1984).

We are cognizant of the reliability concerns that have led courts to exclude grand jury testimony from use *by the prosecution* at trial. *See, e.g., United States v. Thevis*, 665 F.2d 616, 629 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982):

> Grand jury testimony, although given under oath, is not subjected to the vigorous truth testing of cross-examination, as is prior testimony. Grand jury testimony, moreover, is often given under grant of immunity which might encourage a witness to "embellish" his story.

See also McKethan v. United States, 439 U.S. 936, 938, 99 S.Ct. 333, 334, 58 L.Ed.2d 333 (1978) (Stewart, J., dissenting from the denial of certiorari) (noting, *inter alia*, that no one is present to "give the defendant's version of the story"); *United States v. West*, 574 F.2d 1131, 1138-39 (4th Cir.1978) (Widener, J., dissenting) (confrontation clause concerns where grand jury testimony introduced against defendant).

But when the *defendant* wishes to introduce the grand jury testimony that the government used to obtain his indictment, those concerns about reliability and accuracy are absent. Every factor present in the

grand jury—the *ex parte* nature of the proceeding, the leading questions by the government, the absence of the defendant, the tendency of a witness to favor the government because of the grant of immunity, the absence of confrontation—is adverse to the interest of the defendants, not the government. Yet it is the government here which seeks to avail itself of the protections of Fed.R.Evid. 804(b)(1). Since the witnesses were only unilaterally "unavailable" and could have been subjected to cross-examination by the government, we will not countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government.

It is indeed troubling to us that after identifying Bruno and DeMatteis as exculpatory witnesses under *Brady*, the government then sought to make it impossible for the defendants to obtain the exculpating testimony. In resisting the admission of the grand jury transcripts, the government was not true to the letter or spirit of *Brady*, where the Supreme Court said:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97. To say that the government satisfied its obligation under *Brady* by informing the defendants of the existence of favorable evidence, while simultaneously ensuring that the defendants could neither obtain nor use the evidence, would be nothing more than a semantic somersault. However, we rest our decision on our interpretation and application of Fed.R.Evid. 804(b)(1), and not *Brady v. Maryland*, keeping in mind the

time-honored rule that we should not reach constitutional issues unless absolutely necessary.

In so holding, we note that the government is in no way *required* to grant use immunity to a witness called by the defense; it is simply left with a series of choices. Immunity remains "pre-eminently a function of the Executive Branch." *United States v. Turkish*, 623 F.2d 769, 776 (2d Cir.1980) (citing *Ullman v. United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956)), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981); *United States v. Lang*, 589 F.2d 92, 96 (2d Cir.1978) (collecting cases). *See also* 18 U.S.C. § 6003 (immunity in court and grand jury proceedings).

The government is no stranger to such choices; in fact, it made a similar choice when Bruno and DeMatteis were originally called before the grand jury. In front of the grand jury, the government felt it had to make a smaller sacrifice (by granting Bruno and DeMatteis use immunity) in order to achieve the greater goal of indicting the defendants. To make a similar choice at trial is not too great a burden to cast on the government.

The government, of course could have granted initially defendants' request to immunize Bruno and DeMatteis, heard their live testimony, and thereby prevented admission of the grand jury transcripts, for then the witnesses would have been available to both sides. However, once the government made Bruno and DeMatteis unavailable to the defense by refusing to immunize them at trial, the grand jury transcript should have been admitted as prior testimony of an unavailable declarant under rule 804(b)(1). At that point, the government would have been faced with another choice: it could have then im-

munized the witnesses and called them to testify about their grand jury testimony. Had it done so, Fed.R.Evid. 806 would have permitted the government to cross-examine these witnesses even though it would have been the government who had called them. Or, it could have chosen not to immunize the witnesses, and thereby waived its right to any further live examination. Had it chosen this course, rule 806 still would have permitted impeachment of Bruno and DeMatteis as hearsay declarants, as if they were actually testifying, and the rule exempts the government from the usual condition that a witness's prior inconsistent statement may not be used without first confronting the witness with the statement. In other words, after the grand jury testimony of Bruno and DeMatteis was admitted, the government would have a full and fair opportunty to discredit that testimony.

In short, the district court erred in excluding the exculpatory grand jury testimony of Bruno and DeMatteis. That testimony was former testimony given by a declarant unavailable to the defendants, and the opportunity and similar motive to develop the testimony in front of the grand jury is irrelevant, because the declarants were not similarly unavailable to the government at trial.

3. The scope of the error

The error in excluding the grand jury testimony would be reversible error, however, only if the evidence is "material"; that is, "if there is a reasonable probability that, had the evidence been [admitted], the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); *see also United States v. Underwood*, 932 F.2d 1049 (2d Cir.1991). After reviewing the grand jury minutes, which were transmitted to us under seal, our confidence in the outcome is sufficiently undermined to require reversal of the convictions based on the Construction Case.

Pacquale Bruno and Frederick DeMatteis were both principal players in Cedar Park, one of the largest contractors in the metropolitan New York City concrete industry. Arguably, without their participation there could be no "club" of concrete contractors. Very generally stated, their grand jury testimony denied any awareness of, let alone participation in, such a "club". If this testimony had been believed, it is reasonably probable that the jury would have concluded either that no such "club" existed, or at the very least that there was reasonable doubt as to its existence. Without the "club", the Construction Case simply dissolves. Indeed, the central importance of the "club's" existence is probably why the government felt obligated to identify Bruno and DeMatteis as sources of exculpatory testimony under *Brady v. Maryland*. Excluding their grand jury testimony therefore requires, at the very least, reversal of the Construction Case convictions.

But we cannot stop there. As discussed at the beginning of this opinion, the Construction Case formed the core of the RICO charges—we analogized the remaining counts and predicate acts to "barnacles" on the ship that was the Construction Case. Without a ship, however, barnacles have nothing to cling to. Because such a huge portion of this case must be reversed on this single evidentiary error, and because

the spillover taint undermines the convictions on the lesser counts as well, we reverse the convictions of all eight appealing defendants *in toto*.

The Food Case—the largest portion of the indictment aside from the Construction Case—was not directly affected by the exclusion of the grand jury testimony. However, given that the Food Case involved only Salerno (and on one count, Ianniello, whose convictions we would reverse on other grounds set forth below), we would be less than honest if we said that there was not a "reasonable probability" that the erroneously-achieved Construction Case verdicts had tainted these verdicts as well. The likelihood of prejudicial taint, from the numerous erroneous verdicts to the remaining few, is simply too great for us to ignore. "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." *Kotteakos*, 328 U.S. at 774, 66 S.Ct. at 1252.

B. *Ianniello's Bias Defense*

During the government's case-in-chief, the only evidence presented against Matthew Ianniello was tape-recorded evidence. All of this evidence was gathered by agents of the Federal Bureau of Investigation, who—pursuant to their obligation to "minimize" the conversations they were taping—switched the tape recorder on and off, selectively recording Ianniello's conversations. From these tape recordings, the FBI agents prepared transcripts, which were ultimately submitted to the jury.

Ianniello prepared a similar set of transcripts from the tapes, but they differed from the govern-

ment's versions in numerous instances. Based on these differences as well as on the agents' opportunity to select what they recorded, one of Ianniello's defenses was that the FBI agents were biased against Ianniello, and deliberately selected their recordings so as to reflect unfavorably on him. A major part of the defense was that the agents' bias was established by their mistranscribing of Ianniello's conversations.

During cross-examination of the FBI agents, counsel for Ianniello attempted to examine the agents on the subject of their alleged bias against him, and particularly on the instances of mistranscription. At numerous points in the record, Judge Lowe made it clear that such inquiries into the intent and motivation of the agents in preparing the tapes and transcripts would have to wait until Ianniello's own case. At one point, she said:

> I have made the blanket rule that there will be no more making these witnesses their own [referring to the defendants] for purposes of impugning the integrity of those witnesses. They are going to have to do it on their own case.

At the same time, Judge Lowe recognized the propriety of Ianniello's bias defense, as this colloquy demonstrates:

> THE COURT: Wait a minute, I'm not finished. If you as the defense lawyer believe that you can demonstrate in your case a pattern of these errors which would lead a jury to infer some kind of bias or prejudice or just plain venality on the part of these agents, you have every right to do that.

I have consistently said you have the right to do that. That's why I do not see what the problem is.

MR. NEWMAN: Judge—

MR. GOLDBERG: What you're saying is that it can await the defense case and—

THE COURT: Yes.

However, when Ianniello's counsel, Jay Goldberg, attempted to recall the FBI agents during his side of the case, he was met with resistance from both the government and Judge Lowe:

MR. COHEN: * * * For whatever tactical reasons the record will disclose that with some agents when they offered the transcripts various lawyers chose to examine with respect to whether the transcripts are fair and accurate, whether the agents had a motive or bias against the defendants. Those were tactical choices made by all the lawyers, including Mr. Goldberg.

* * * * *

Those are tactical decisions which throughout the case, as each group of transcripts were put in, the lawyers made, Mr. Goldberg included. Similarly as transcripts were played the defendants' counsel made their decisions as to whether to play the tape and offer at that moment their alternate transcript, a tactical decision made by the respective counsel.

They made their choice but the record here more than amply reflects that anybody who wanted to cross examine an agent with respect to whether he was out to frame the defendant when a transcript was offered, when the tapes were offered, could well have done that. Sometimes they did, sometimes they didn't. That is all I have to add.

MR. GOLDBERG: I have nothing to add, Judge.

THE COURT: Mr. Goldberg, what agents do you believe you have the right to call?

MR. GOLDBERG: I have a right to call Agents Kelleher, Fanning and Butchko.

THE COURT: That request is denied.

We are acutely aware that an abuse of discretion standard governs our review of trial court decisions to limit cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *United States v. Maldonado-Rivera*, 922 F.2d 934, 956 (2d Cir. 1990); *Harper v. Kelly*, 916 F.2d 54, 57 (2d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1403, 113 L.Ed.2d 459 (1991). We are similarly aware, as the government reminds us, that a defendant does not have an absolute right to examine a government witness to elicit evidence of bias. In *United States v. Blackwood*, 456 F.2d 526 (2d Cir.), *cert. denied*, 409 U.S. 863, 93 S.Ct. 154, 34 L.Ed.2d 110 (1972), cited by the government, we held that the district court's refusal to recall a government witness during a defendant's case was not an abuse of discretion where the defendant failed to show "any valid reason for his failure to use the material then in his possession during his earlier cross-examination of that witness." *Id.* at 529-30.

This case is completely unlike *Blackwood*, though, and for obvious reasons. Judge Lowe clearly, explicitly, and repeatedly instructed counsel for Ianniello that questioning the agents about bias and illicit mot-

tive would have to wait for the defense case. But then, when the time for his defense case arrived, she again denied him the opportunity based on the prosecutor's contention that he "could well have done that" on his earlier cross-examination of the agents. We see no way that Judge Lowe's about-face can be justified.

This was not a harmless error. By instructing Ianniello to wait to make the bias inquiry, and then refusing to allow it, the district court effectively prevented Ianniello from presenting a defense. This was an error of constitutional magnitude. The Supreme Court has long held that criminal defendants have, at a minimum, "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 1000, 94 L.Ed.2d 40 (1987). *See also Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (Mississippi common law rule forbidding impeachment of one's own witness deprived defendant of his right to defend against state's charges). "[A] trial court must allow some cross-examination of a witness to show bias." *United States v. Abel*, 469 U.S. 45, 50, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984) (citing *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931)); *see also Olden v. Kentucky*, 488 U.S. 227, 231-32, 109 S.Ct. 480, 482-83, 102 L.Ed.2d 513 (1988) (per curiam); *Delaware v. Van Arsdall*, 475 U.S. at 677, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674. Judge Lowe's inconsistent and unexplainable rulings deprived Ianniello of his right to present a defense, and constituted reversible error.

C. *The Government's Inconsistent Positions*

Nicholas Auletta contends that the district court abused its discretion by precluding him from estab-

lishing that the government had prosecuted the commission case under the theory that Auletta—like many other contractors—was a victim of extortion by the members of the commission, a theory that was inconsistent with the government's position in this case. He argues that he should have been able to introduce the indictment, as well as the government's opening and closing statements from the commission case as admissions of a party-opponent under Fed.R. Evid. 801(d)(2). The government argues that the exclusion of this evidence was well within Judge Lowe's discretion, since being a victim of extortion is not inconsistent with fraudulent bid-rigging, the charge against Auletta in this case.

Since we reverse the convictions of all defendants on other grounds, it is not necessary to reach this issue in order to decide this appeal. Nevertheless, since a retrial is likely, we offer some guidance on this subject. An indictment is not admissible as an admission of a party-opponent, since it is "the charge of a grand jury, and a grand jury is neither an officer nor an agent of the United States, but a part of the court." *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.) (L. Hand, J.), *cert. denied*, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928). *See also United States v. GAF Corp.*, 928 F.2d 1253, 1261 (2d Cir. 1991) (quoting *Falter*).

However, the jury arguments are another story. In *United States v. McKeon*, 738 F.2d 26 (2d Cir.1984), we refused to adopt a *per se* prohibition on the use of prior opening statements in criminal trials. There, in language particularly appropriate to this case, we said:

> To hold otherwise would not only invite abuse and sharp practice but would also weaken confi-

> dence in the justice system itself by denying the function of trials as truth-seeking proceedings. That function cannot be affirmed if parties are free, wholly without explanation, to make fundamental changes in the version of facts within their personal knowledge between trials and to conceal these changes from the final trier of fact.

Id. at 31. Recognizing that serious collateral consequences could result from the unbridled use of such statements, we there circumscribed the evidentiary use of prior jury arguments. First, "the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial." *Id.* at 33. Second, the court must determine "that the statements of counsel were such as to be the equivalent of testimonial statements" made by the client. *Id.* Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw "is a fair one and that an innocent explanation for the inconsistency does not exist." *Id.*

The government seeks to explain the seeming inconsistency by reference to our decision in the commission case, *United States v. Salerno*, 868 F.2d 524 (2d Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989). The commission case was different from this case (the "club case"), according to the government's brief, in the following ways:

> Because the Commission prosecution focused on the crimes committed by the organized crime originators of the Club in forming that group, no members of the Club were prosecuted in that case. Nonetheless, the investigation had made

> clear that even as the contractors had been forced to pay tribute to the Mob they had cooperated in a massive bid-rigging fraud on every major public and private developer in New York between 1981 and 1985. It was to prosecute this fraud that a second case, [the club case], was brought. Among the defendants charged in this prosecution was Nicholas Auletta, for whom the Club proved not a straightjacket but a springboard to spectacular economic success.

In this case, Auletta was prosecuted for—and convicted of—violating the mail fraud statute, 18 U.S.C. § 1341. To convict Auletta of mail fraud, the government had to show, *inter alia*, that the mailings were done "for the purpose of" rigging bids. Auletta attempted to introduce the government's opening and closing statements from the commission case in order to counter the government's theory that the acts of mailing were done by him with the purpose of executing a scheme to defraud.

We believe, in light of the specific intent requirement of the mail fraud statute, the district court abused its discretion in refusing to admit evidence that might have disproved that Auletta had the purpose of rigging bids in mind when he deposited the bids in the mail. Had the jury viewed Auletta the way the government did in the commission case, they might have concluded that his purpose was other than bid-rigging when he deposited the bids in the mail. These excerpts from the government's closing argument in the commission case are illustrative:

> Just two months before in February of 1984, Auletta's position is described. Here in this tape you have Furnari, Migliore and Cafaro talking.

I talked about it before. And Furnari has asked to have North Berry swap a job with S & A. And Migliore is angry that at first it seems that Nicky Auletta has been audacious enough to resist this. Then what does Cafaro say? He tells you something that sums it up in just a phrase. Cafaro explains, "You can't really blame Nicky." Using his words, "He is like a puppet on a string."

* * * * *

Now, ladies and gentlemen, in their openings defense counsel said that you would find that the Club contractors wanted to join the Club; they were the ones who initiated the scheme to develop a Club; the contractors rushed into the arms of the Mafia; and that's what these gentlemen, the defense counsel, are going to try to get you to believe, that this was nothing more than simply a bid-rigging scheme that was working just to the advantage of the contractors.

Well, it is true, certainly, that the Club scheme involved bid-rigging. But the bid-rigging was being dominated, was being controlled not by the contractors, but, as you have heard over and over again, literally dozens of times in the tapes, it was the mob that was making the decisions about the bids and who would bid high and who would bid low.

Apparently, the government has taken the same evidentiary clay that they used in the commission case and, for purposes of this trial, resculpted Auletta from a "puppet on a string" to a bid-rigger. The government was free to choose, for tactical or other reasons, not to join Auletta in the commission case, and to postpone his prosecution until they brought the club case. Even so,

> [t]he jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims. Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts.

United States v. GAF Corp., 928 F.2d at 1260.

In summary, this is a telling example of one of the problems the government creates by framing such huge indictments. A prosecution of this magnitude is necessarily generalized and even vague in some respects, and the "differences" between the commission case and the club case illustrate just how malleable such a prosecution can become. Perhaps Auletta was a culpable bid-rigger; perhaps he was a puppet on a string. The government, at different times, has urged both—and the jury was entitled to know that, because the jury, and not the government, must ultimately decide which he was.

D. *The Alleged Jury Door Incident*

On a previous appeal of this case heard by another panel of this court, very serious allegations of misconduct by the trial judge and a court officer were made. *United States v. Ianniello*, 866 F.2d 540 (2d Cir. 1989), *vacating and remanding United States v. Salerno*, 698 F.Supp. 1109 (S.D.N.Y.1988) (Lowe, J.). That panel remanded the matter to the district court for an inquiry to determine (1) whether the judge or the courtroom marshal made the alleged *ex parte* statements to the jury; (2) what each said, if

anything; (3) the factual circumstances surrounding any such contacts; and (4) whether the jurors who heard the alleged statements communicated them to the other jurors. *Ianniello*, 866 F.2d at 544.

On remand, Chief Judge Brieant of the Southern District conducted the inquiry, and concluded that "there is no credible evidence that either Judge Lowe or Deputy Marshal Perrine interfered with the deliberations of the jurors or attempted in any way to influence or coerce the trial jury." *Ianniello*, 740 F.Supp. at 195.

On appeal, all defendants contend that the procedures followed on the remand were unfair and that the findings by Chief Judge Brieant were clearly erroneous. Again, since we reverse the convictions of all appealing defendants on other grounds, it is unnecessary to decide these issues in order to resolve this case. We are left, however, with a nagging sense of frustration at Judge Lowe's certification in affidavit form that she does not recall having appeared at the jury door or ever telling the jury to acquit or convict. Had such conduct actually occurred we would, of course, uniformly reverse. We are left, however, with Chief Judge Brieant's finding in the matter, which is not clearly erroneous.

We do have some question as to whether the district court's finding that the deputy marshal was "lacking any motive to lie", *see* 740 F.Supp. at 182, was clearly erroneous, for in the very next paragraph of his opinion, Chief Judge Brieant points out that "[a] Deputy Marshal who violates his oath while having custody of jurors risks severe punishment, including discharge from his employment." *Id.* With his job at stake, any deputy marshal charged with making improper comments about the case to a de-

liberating juror would not be "lacking any motive to lie".

Nevertheless, because we reverse on other grounds, we need not make these determinations. Because such conduct would be so far beyond the bounds of permissible behavior by anyone connected with the courts, we do not expect that the issue will arise ever again.

IV. CONCLUSION

The convictions of Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, Aniello Migliore, and Matthew Ianniello, are reversed, and the case is remanded for further proceedings.

APPENDIX

Analysis of Counts and predicate acts in United States v. Salerno, et al.

Predicate/Count and "Case"	Salerno	Vincent DiNapoli	Louis DiNapoli	Auletta	Halloran	Chattin	Migliore	Ianniello	Tronolone	Rockman	Costa
--/1 RICO Consp.	G	G	G	G	G	G	G	G	N	N	G
--/2 RICO Subst.	G	G	G	G	G	G	G	G	N	N	G
1/3 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
2/4 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
3/5 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
4/6 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
5/7 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
6/8 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
7/9 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
8/10 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
9/11 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
10/12 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
11/13 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
12/14 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
13/15 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
14/16 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
15/17 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
16/18 Construction	F/G	F/G	F/G	F/G	F/G	F/G	F/G				
17/19 Teamsters	N/N		—						N/N	N/N	
18/20 Teamsters	N/N								N/N	N/N	
19/-- Construction					G*/-						
20/-- Construction					G*/-						
21/-- Construction					G/--						

APPENDIX—Continued

Analysis of Counts and predicate acts in United States v. Salerno, et al.

Predicate/Count and "Case"	Salerno	Vincent DiNapoli	Louis DiNapoli	Auletta	Halloran	Chattin	Migliore	Ianniello	Tronolone	Rockman	Costa
22/-- Construction				—	F/--						
23/-- Labor Payoff	F/--							F/--			
24/-- Giordano	S/--							S/--			
25/21 Food	F/G							F/G			F/G
26/22 Food	F/G										F/G
27/23 Food	F/G										F/G
28/24 Food	F/G										F/G
29/25 Food	F/G										F/G
30/26 Food	F/G										F/G
31/27 Food	F/G										F/G
32/28 Food	F/G										F/G
33/29 Food											F/G
34/30 Food											F/G
35/31 Food	F/G										F/G
36/-- Food											F/--
37/32 Rackets	F/G		F/NC								
38/33 Rackets	N/N										
39/34 Rackets	N/N										
40/35 Rackets	N/N										
41/-- Simone	N/--							N/--			

G = Guilty F = Found N = Not guilty or Not found S = Split decision

* = Jury found Halloran had committed racketeering acts 19 and 20 as to Count One, but not as to Count Two.

NC = Louis DiNapoli was not charged in the substantive count.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of November, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE GEORGE C. PRATT,
HONORABLE ROGER J. MINER,
HONORABLE FRANK X. ALTIMARI,
Circuit Judges.

Nos. 88-1464, -1470, -1472, -1473, -1474, 1477, -1547;
90-1291, -1292, -1296, -1297, -1301, -1311,
-1312, -1351

UNITED STATES OF AMERICA, APPELLEE,

- against -

ANTHONY SALERNO, a/k/a "FAT TONY", VINCENT DI NAPOLI, a/k/a "VINNIE", LOUIS DI NAPOLI, a/k/a "LOUIE", MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE", JOHN TRONOLONE, a/k/a "PEANUTS", MILTON ROCKMAN, a/k/a "MAISHE", NICHOLAS AULETTA, a/k/a "NICK", EDWARD J. HALLORAN, a/k/a "BIFF", ALVIN O. CHATTIN, a/k/a "AL", RICHARD COSTA, a/k/a "RICHIE", and ANIELLO MIGLIORE, a/k/a "NEIL", DEFENDANTS,

MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE", VINCENT DI NAPOLI, a/k/a "VINNIE", LOUIS DI NAPOLI, a/k/a "LOUIE", NICHOLAS AULETTA, a/k/a "NICK", EDWARD J. HALLORAN, a/k/a "BIFF", ANIELLO MIGLIORE, a/k/a "NEIL", ANTHONY SALERNO, a/k/a "FAT TONY", and ALVIN O. CHATTIN, a/k/a "AL", DEFENDANTS-APPELLANTS.

[Filed Nov. 6, 1991]

IT IS HEREBY ORDERED that the last sentence of Part IIIA2a of the opinion in this case, now published at 937 F.2d 797, 805, is hereby deleted and replaced with the following:

> Thus, in interpreting Rule 804(b)(1) and particularly the condition attached to that rule requiring a "similar motive" to develop the prior testimony, we view the testimony of Bruno and DeMatteis as available to the government but unavailable to the defendants. It goes without saying, of course, that we have not considered in this case, because the issue is not before us, whether the government's power to grant immunity would affect a declarant's "availability" under any of the other subdivisions of Rule 804(b).

/s/ George C. Pratt
GEORGE C. PRATT, U.S.C.J.

/s/ Roger J. Miner
ROGER J. MINER, U.S.C.J.

/s/ Frank X. Altimari
FRANK X. ALTIMARI, U.S.C.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

86 Cr. 245 (MJL)

UNITED STATES OF AMERICA

-v-

ANTHONY SALERNO, ET AL., DEFENDANTS

[Filed Feb. 1, 1988]

MEMORANDUM OPINION AND ORDER

MARY JOHNSON LOWE, D. J.

Defendants Vincent DiNapoli and Louis DiNapoli were informed by the government that Fred DeMatteis and Pasquale Bruno had testified under immunity before the grand jury which returned the indictment in this case and that DiMatteis and Bruno should be interviewed by the defendants under *Brady v. Maryland*, 373 U.S. 83 (1963).

DiMatteis and Bruno were subpoenaed to testify as defense witnesses on trial. Under questioning by the Court, each asserted the Fifth Amendment privilege against self-incrimination, which assertion the Court found had a basis in fact.

Counsel for Louis and Vincent DiNapoli then moved that this Court direct the government to furnish defense counsel copies of the grand jury testimony of Bruno and DiMatteis [1] under Fed. R. Ev. 804(b)(1).[2] The government opposed the motion, and, when queried, also opposed granting immunity to Bruno and DiMatteis for purposes of the trial.

Background

The moving defendants are charged in the indictment, *inter alia*, with participation in a scheme to defraud owners of high rise concrete superstructures in Manhattan by rigging bids for the concrete work. DiMatteis and Bruno were both principals of Cedar Park Concrete Construction Corp. ("Cedar Park").

At trial the government witness Costigan testified that Bruno asked him to make "complementary bids" on several jobs.[3] Costigan further testified that he

---

[1] Defendants argue that they are entitled to offer the witnesses' grand jury testimony as affirmative evidence of defendants' innocence of the charges in the indictment.

[2] Rule 804(b)(1) of the Federal Rules of Evidence permits the admission of prior testimony where the declarant is unavailable. The Rule states:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
>
> (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[3] A complementary bid is one made with no expectation of success but is a part of a bid rigging scheme.

had been told by an unindicted co-conspirator that Cedar Park was a member of a "Club" which exacted a two percent tribute for all concrete contracts awarded over a certain amount. The unindicted co-conspirator stated that when Cedar Park was awarded such a contract and failed to pay the two percent, it was forced out of business.

The government witness Sternchos testified that he was told by the same unindicted co-conspirator that Vincent DiNapoli represented the interests of Cedar Park at the "Club". The government introduced Exhibit 429 allegedly written by Louis DiNapoli which had the notation: "Cedar Park V & T 10%" which the government claims shows Vincent DiNapoli's hidden interest in Cedar Park.

Because of the *Brady* letter sent to defendants by the government after the grand jury testimony of Bruno and DiMatteis, the defendants argue that the grand jury testimony of these witnesses contain exculpatory material which is admissible under Fed.R. Ev. 804(b)(1).

The Court of Appeals for this Circuit has never ruled on the use of grand jury testimony under 804(b)(1) by the defense. Judge Owen of this Court, in an unpublished opinion in *United States v. Salerno* ("*Salerno I*" or "The Commission Case"), SSS 85 Cr. 139 (April 10, 1987), rejected the identical defense claim.[4]

[4] Judge Owen ruled that the issue was not properly presented because the defendants had not established that the witnesses were "unavailable" since they had not been presented at trial to assert their Fifth Amendment privilege. Nevertheless, Judge Owen observed:

> Further, even assuming, therefore, that grand jury testimony is *ever* admissible under Rule 804(b)(1), its

The defendants argue that then District Court Judge George C. Pratt in *United States v. Maritas*, 81 Cr. 122, E.D.N.Y. followed the procedure now urged upon this Court for admission of grand jury testimony. Examination of the minutes in *Maritas* does not support this claim. The trial record does not disclose that Judge Pratt directed the prosecution to furnish defendants with grand jury testimony and ordered use of such testimony at trial. The result reached in *Maritas* was pursuant to agreement between the prosecution and defense. We have no such agreement in the instant case.

DISCUSSION

The issue squarely presented to this Court is whether a defendant may introduce into evidence at trial immunized grand jury testimony, after the grand jury witness has asserted his Fifth Amendment privilege[5] and the government refuses to im-

> receipt must be preconditioned on a careful assessment under Rule 804(b)(1), of the realistic opportunity and motive which the government had to cross-examine. That assessment is mandated not only by Rule 804(b)(1), but by the need to avoid chilling Grand Jury witnesses in order to gain a proper opportunity to cross-examine. *See United States v. Shandell*, 800 F.2d 322, 324 (2d Cir. 1986) (no need to grant defense immunity to grand jury witness who is target of prosecution).
>
> In this case, for the reasons set forth in the Government's separately submitted affidavit, there was neither motive nor opportunity to cross-examine Bruno in the Grand Jury. That testimony was accordingly inadmissible under Rule 804(b)(1).

[5] This case is to be distinguished from one in which the witness is not called to assert the privilege, *i.e.*, *United States v. Wright*, 558 F.2d 31 (2nd Cir. 1978), or in which the at-

munize the witness for purposes of trial.[6] We are, in other words, asked to decide whether such grand jury testimony is within the purview of Rule 804(d)(1).

Even though there is scant law on the subject, 804(b)(1) in the grand jury testimony context must be read with the gloss of history.

We start first with the government's obligation under *Brady* v. *Maryland*, to advise a defendant of any evidence in its possession which may be deemed exculpatory. After Bruno and DiMatteis testified under a grant of immunity before the grand jury, the government advised defense counsel that the witnesses had testified to matters favorable to the accused in this case. This advice alerted the accused that Bruno and DeMatteis allegedly had exculpatory evidence. That is all that is required under *Brady*. The Court of Appeals in *United States v. Turkish*, 623 F.2d at 775 reasoned that *Brady* has not been extended to create a governmental obligation to assist the defense in extracting from others evidence shielded by a valid assertion of privilege. The Court further held that although the Fifth Amendment privilege may be displaced, at the prosecution's dis-

---

torney for the witness stated that if witnesses were called he would assert the Fifth Amendment. *Salerno I*, SSS 85 Cr. 139 (April 10, 1987).

[6] The law of this Circuit is that failure to grant immunity to a defense witness does not violate the Sixth Amendment (Compulsory Process Clause) nor the Fifth Amendment (either under a claim of equalizing the powers of prosecution and defense or pursuit of truth), *United States v. Turkish*, 623 F.2d 769, 773-777 (2d Cir. 1980). But *see*, *United States v. DePalma*, 476 F.Supp. 775 (S.D.N.Y. 1979) decided a year before *Turkish*.

cretion, by a grant of immunity, the decision to grant immunity is an executive not a judicial function.

Recognizing that *Turkish* prevents any argument based on a defendant's right of access to exculpatory testimony shielded by valid privilege, the next arrow in the defense bow is 804(b)(1).

There is a certain tension between a literal reading of 804(b)(1) in the context of grand jury testimony, and Fed.R.Crim. P. 6(e)(3)(C)(i). The later rule authorizes disclosure of grand jury testimony "when so directed by a court preliminarily to or in connection with a judicial proceeding . . . ." When Rule 6 is applicable, a court's decision to disclose grand jury testimony should be based upon a particularized need *which outweighs the possible effect of disclosure upon the functioning of future grand juries. In re Grocery Products Grand Jury Proceedings of 1983*, 637 F. Supp. 1171 (D. Conn. 1986).

A literal application of 804(b)(1) to the facts in this case, one may argue, would dictate disclosure. The testimony sought was given at a prior hearing in the same proceeding and is sought to be offered against the government which had the opportunity to examine the witness. However, the application of the Rule to the facts in this case is not so simple. The difficulty arises in interpreting the phrases "another hearing" and "similar motive to develop the testimony" used in 804(b)(1).

Courts have had no difficulty in applying the rule to former testimony given at a prior adversary hearing where the party against whom the testimony is offered either cross-examined or had the opportunity to do so. *United States v. Singleton*, 460 F.2d 1148, 1152-53 (2d Cir. 1972). *United States v. Paris*, 551

F.2d 233 (8th Cir. 1977). However when the prior testimony, even if subject to cross-examination, was given at a hearing where the issue to be resolved was different from that of the second hearing, the prior testimony is inadmissible. The Second Circuit has made this point explicit in *United States v. Wingate*, 520 F.2d 309, 315-16 (1975) and implicit in *United States v. Serna*, 799 F.2d 842 (1986).

In *Wingate*, the defendant argued that he should be permitted to introduce the suppression hearing testimony of his co-defendant, Smith,[7] because Smith therein repudiated earlier statements implicating Wingate. Judge Hays, writing for the Court (Judge Mansfield concurring), explained:

> Testimony given at a previous trial or at a pretrial hearing by a presently unavailable witness is inadmissible at a subsequent trial unless the issues in the two proceedings are sufficiently similar to assure that the opposing party had a meaningful opportunity to cross-examine when the testimony was first offered. [citations omitted.] The issue at the suppression hearing in this case was not whether Wingate was guilty or innocent but rather whether Smith's confession was made voluntarily . . . .[8]

Serna dealt with the admissibility of portions of the trial transcript of a co-conspirator, Chupurdy, whose trial preceeded that of Serna and a co-defendant, Cinnate.[9] The defendants in the later trial ar-

[7] Since Wingate could not compel his co-defendant to testify, the co-defendant was "unavailable".

[8] *Wingate*, 520 F.2d at 316.

[9] Another co-conspirator, Castellan, entered into a cooperation agreement and testified for the government at both trials.

gued that the testimony of Chupurdy at his trial, which the defendants claimed was exculpatory [as] to them, should have been admitted under 804(b)(1). The trial Court, although believing that Chupurdy would assert a Fifth Amendment privilege in response to defendants' subpoena, refused to admit the former testimony.

Judge Oakes, writing for the Court, explained:

> Because Castellon's credibility was a key issue in Chupurdy's case, the prosecutor arguably had a motive to cross-examine Chupurdy on his claim that he had not attended a House of Pancakes meeting. However, since cross-examination was unlikely to shake Chupurdy's denial of such a meeting, the prosecutor, wisely, we think, chose to focus his cross-examination on the details of Chupurdy's transportation of the container to show that his claim of ignorance of its contents was unbelievable, rather than to emphasize to the jury Chupurdy's denial of any House of Pancakes meeting. Thus, exclusion of Chupurdy's statements was not an abuse of the trial court's discretion since the prosecutor had no real motive to explore Chupurdy's earlier statements.[10]

The combined teaching of *Wingate* and *Serna* has direct application to the issue before this Court.

Historically the grand jury has been a body of citizens before whom evidence is presented by the prosecuting attorney for the purpose of the jurors reaching a determination whether the evidence constitutes sufficient cause to return an indictment. *Costello v. United States*, 350 U.S. 359, 361 (1956).

[10] *United States v. Serna*, 799 F.2d 849-50.

The motive or purpose of a prosecutor in presenting a witness to the grand jury is to explore evidence of criminal conduct, not of the witness, but of the target of the investigation. If the prosecutor believes the witness has not testified truthfully he has the discretion to decide not to attack the credibility of the witness in the grand jury proceeding but to pursue his remedy under the perjury statutes. *Cf., United States v. Lester*, 749 F.2d 1288, 1300-01 (9th Cir. 1984).

Thus, one of the fundamental reasons for the hearsay exception embodied in 804(b)(1) is not present when grand jury testimony is offered at trial, not to impeach the declarant, but as trustworthy affirmative evidence of the guilt or innocence of the accused. Former testimony, under the hearsay exception, is a substitute for the testimony the unavailable witness would have given at trial. The "opportunity and similar motive to develop the testimony" language of Rule 804(b)(1) "operates to screen out those statements, which although made under oath, were not subject to the scrutiny of a party interested in thoroughly testing its validity." *United States v. Pizarro*, 717 F. 2d 336, 349 (7th Cir. 1983).

When the character or posture of the prior proceeding is different from the subsequent proceeding, and that difference dictates the parameters for development of the prior testimony, the prior testimony is inadmissible in the subsequent proceeding. The fact that the prosecutor, in the grand jury, had the opportunity to then discredit the testimony of the witness and did not choose to do so does not address the rationale of the 804(b)(1) hearsay exception. Cross-examination or the opportunity to cross-examine is not talismanic. The test is rather whether there was

a motive to develop the prior testimony. *McCormick on Evidence*, § 255 at 616 (2d ed. 1972) explains the meaning of the Rule:

> The opportunity [to cross-examine] must have been such as to render the conduct of the cross-examination or the decision not to cross-examine meaningful in the light of the circumstances which prevail when the former testimony is offered. A change of circumstances may be such as to bar compliance with this requirement.

This court finds that the motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial. This difference in motive to examine or cross-examine prevents the introduction of the grand jury testimony of DeMatteis and Bruno under Fed.F.Ev. 804(b)(1).

The defendants argue that under Fed.R.Ev. 806 the government has ample opportunity to offer evidence to discredit the grand jury testimony, and that therefore the trustworthiness of that testimony can be placed before the trial jury. This argument exposes another reason why the testimony should not be admitted in the first place.

In this case, the government has placed under seal materials which seriously undercut the truthfulness of the grand jury testimony and explain why the prosecutor did not pursue the witnesses, by way of cross-examination, in the grand jury.

If the government, at trial, was compelled to discredit the grand jury testimony by using the materials under seal, it would be required to publicly disclose information in possession of the grand jury which the government is prevented from disclosing

under Fed.R.Crim.P. 6. This Court finds therefore that there is no adequate guarantee of reliability of the grand jury testimony to justfy its placement before this jury.

Defendants' motion is in all respects denied.

IT IS SO ORDERED:

Dated: New York, New York
February 1, 1988

/s/ Mary Johnson Lowe
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 88-1464, 88-1470, 88-1471, 88-1472, 88-1473, 88-1474, 88-1477, 88-1547, 90-1291, 90-1292, 90-1296, 90-1297, 90-1301, 90-1311, 90-1312, 90-1351

UNITED STATES OF AMERICA, APPELLEE

-against-

ANTHONY SALERNO, a/k/a "Fat Tony," VINCENT DI NAPOLI, a/k/a "Vinnie," LOUIS DI NAPOLI, a/k/a "Louie," MATTHEW IANNIELLO, a/k/a "Peanuts," MILTON ROCHMAN, a/k/a "Maishe," NICHOLAS AULETTA, a/k/a "Nick," EDWARD J. HALLORAN, a/k/a "Biff," ALVIN O. CHATTIN, a/k/a "Al" RICHARD COSTS, a/k/a "Richie," and ANIELLO MIGLIORE, a/k/a "Neil," DEFENDANTS

MATTHEW IANNIELLO, a/k/a "Matty the Horse," VINCENT DI NAPOLI, a/k/a "Vinnie," LOUIS DI NAPOLI, a/k/a "Louie," NICHOLAS AULETTA, a/k/a "Nick," EDWARD J. HALLORAN, a/k/a "Biff," ANIELLO MIGLIORE, a/k/a "Neil," ANTHONY SALERNO, a/k/a "Fat Tony," and ALVIN O. CHATTIN, a/k/a "Al," DEFENDANTS-APPELLANTS

[Filed Sept. 24, 1991]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee, United States of America.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of November, one thousand nine hundred and ninety-one.

Docket Nos. 88-1464, 88-1470, 88-1471, 88-1472, 88-1473, 88-1474, 88-1477, 88-1547, 90-1291, 90-1292, 90-1296, 90-1297, 90-1301, 90-1311, 90-1312, 90-1351

UNITED STATES OF AMERICA, APPELLEE,

-against-

ANTHONY SALERNO, a/k/a "FAT TONY," VINCENT DI NAPOLI, a/k/a "VINNIE", LOUIS DI NAPOLI, a/k/a "LOUIE", MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE", JOHN TRONOLONE, a/k/a "PEANUTS", MILTON ROCKMAN, a/k/a "MAISHE", NICHOLAS AULETTA, a/k/a "NICK", EDWARD J. HALLORAN, a/k/a "BIFF", ALVIN O. CHATTIN, a/k/a "AL", RICHARD COSTA, a/k/a "RICHIE", and ANIELLO MIGLIORE, a/k/a "NEIL", DEFENDANTS,

MATTHEW IANNIELLO, a/k/a "MATTY THE HORSE", VINCENT DI NAPOLI, a/k/a "VINNIE", LOUIS DI NAPOLI, a/k/a "LOUIE", NICHOLAS AULETTA, a/k/a "NICK", EDWARD J. HALLORAN, a/k/a "BIFF", ANIELLO MIGLIORE, a/k/a "NEIL", ANTHONY SALERNO, a/k/a "FAT TONY", and ALVIN O. CHATTIN, a/k/a "AL", DEFENDANTS-APPELLANTS.

[Filed Nov. 20, 1991]

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by appellee, United States of America,

The panel that heard the appeal having denied rehearing by order dated September 24, 1991, and upon further consideration having amended its opinion by order dated November 6, 1991, and a poll having been requested and taken subsequent to the entry of the September 24, 1991, order,

IT IS HEREBY ORDERED that the final paragraph of the September 24, 1991, order with respect to the suggestion for rehearing en banc is amended to read:

It is further noted that the suggestion for rehearing en banc having been transmitted to the judges of the court in regular active service and at the request of such a judge, a poll of the judges in regular active service having been taken, a majority has voted not to reconsider the matter en banc. Judge Newman dissents from the denial of en banc reconsideration in an opinion concurred in by Judges Kearse, Mahoney and Walker.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH,
Clerk

JON O. NEWMAN, *Circuit Judge* (with whom Kearse, Mahoney, and Walker, *Circuit Judges*, join), dissenting from denial of rehearing in banc:

The panel opinion reverses the outcome of a 13-month criminal trial because of an evidentiary ruling that was consistent with the prior law of this Circuit and with the law of all the other circuits to have considered the issue. The panel holds that in the circumstances of this case two defense witnesses who invoked their privilege against self-incrimination are not "unavailable" to the Government for purposes of the hearsay exception of Rule 804(b)(1) of the Federal Rules of Evidence because the prosecutor had the option of conferring use immunity. As a result of that unprecedented holding, the panel concludes that the District Court erred in excluding under Rule 804(b)(1) the defendants' offer of prior grand jury testimony of the two witnesses. *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991).

The two witnesses had testified at the grand jury under a grant of use immunity and had given testimony favorable to the defendants, testimony that the Government believes was false. The defendants offered the witnesses' grand jury testimony at trial. The District Judge excluded the testimony, deeming it hearsay. She ruled that though the witnesses were "unavailable" to the defendants by virtue of invoking their self-incrimination privilege, their statements did not qualify as hearsay exceptions under Rule 804(b)(1) because the Government did not have a "similar motive" to cross-examine at trial as it had at the grand jury. The panel agrees with the District Judge that a witness who refuses to testify on grounds of self-incrimination is normally "unavailable," *id.* at 805, and that the Government lacked a similar motive

to cross-examine at trial as it had at the grand jury, *id.* at 806. Nevertheless, the panel rules that the Government cannot rely on the lack of similar motive because the witnesses were not "unavailable" *to the Government*, since it could have conferred use immunity at trial.

This Court has previously upheld a trial judge's exclusion under Rule 804(b)(1) of the prior statement of a witness who invokes the self-incrimination privilege at trial. *See United States v. Serna*, 799 F.2d 842 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987). In *Serna* we ruled that the Government's motive to cross-examine the prior statement, which was testimony at the witness's own trial, differed from the motive to cross-examine at the subsequent trial of the witness's co-defendants. Yet *Serna* did not prohibit the Government from relying on this difference in motive. On the contrary, though the Government could have conferred use immunity in *Serna*, the witness was deemed unavailable, the Government was upheld in its claim of lack of similar motive to cross-examine, and the exclusion of the statement was upheld. The law in other circuits agrees with *Serna*. *See, e.g., United States v. Powell*, 894 F.2d 895, 901 (7th Cir.), *cert. denied*, 110 S. Ct. 2189 (1990); *United States v. Lowell*, 649 F.2d 950, 965 (3d Cir. 1981).

Putting the Government to the unattractive choice of suffering the admission into evidence of uncross-examined hearsay that it believes is false or else obtaining the opportunity to cross-examine by conferring use immunity not only ignores the settled law in this Circuit and elsewhere on prior statements of witnesses who invoke the privilege against self-incrimination, but also undermines our consistent

rulings refusing to impose on the Government an obligation to confer use imunity on defense witnesses. *See United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *United States v. Turkish*, 623 F.2d 769, 772-74 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

The panel's ruling also creates serious problems for the Government in the development of evidence at the grand jury. If the Government calls to the grand jury witnesses other than those who are certain to give testimony helpful to the prosecution (and the Government will frequently prefer to call witnesses of this sort, both to investigate undeveloped matters and to freeze a hostile or wavering witness's testimony), it must then accept admission of their hearsay at trial if offered by the defense, or severely limit its opportunity to prosecute them by conferring use immunity. *See United States v. North*, 910 F.2d 843, 853-73 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991). It is no answer to say that the prosecutor may cross-examine the witness in the grand jury. At a preliminary stage of an investigation, the prosecutor might be unaware that the testimony is false. Even if he disbelieves the witness, the prosecutor might lack the basis for effective cross-examination or might jeopardize an ongoing investigation by cross-examination that reveals the existence and identity of confidential sources.

The Government apprehends that the panel's opinion will apply to disable it from claiming a witness's unavailability in other contexts, such as where the Government offers a statement claimed to be against interest under Rule 804(b)(3), *see United States v. Williams*, 927 F.2d 95, 98-99 (2d Cir.), *cert. denied*, —— S. Ct. —— (1991); *United States v. Lang*, 589 F.2d 92, 95-97 (2d Cir. 1978) (use immunity need

not be given to witness "unavailable" for purposes of Rule 804(b)(3)), or where a missing witness charge is objected to on the ground that the witness is equally unavailable to both sides, *United States v. Simmons*, 663 F.2d 107 (D.C. Cir. 1979). The panel has usefully amended its original opinion to make explicit that it is not considering whether its novel ruling on witness unavailability applies beyond the context of Rule 804(b)(1). *United States v. Salerno*, No. 88-1464 (2d Cir. Nov. 6, 1991). But the Government is entitled to be apprehensive that a ruling that a witness is "available" to the prosecution because use immunity can be conferred might in the future be applied to determine "availability" beyond Rule 804(b)(1).

Before this Circuit embarks on a new course that relates witness availability to the Government's opportunity to confer use immunity, a course fraught with serious implications for the conduct of grand jury investigations, the matter should receive the careful consideration of the in banc court. I regret that a majority of my colleagues do not consider this ruling to merit rehearing in banc. If the Supreme Court permits the panel's ruling to stand, one may at least hope that the ruling will be limited not merely to Rule 804(b)(1) statements but to the precise circumstances of this case—namely, a Rule 804(b)(1) statement of a witness on whom the Government has previously conferred use immunity at the grand jury. Because I cannot be confident that the panel intends its ruling to be thus limited, and because the ruling departs without justification from the law of this Circuit and creates a needless intercircuit conflict, I respectfully dissent from the decision not to rehear this case in banc.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45147

91-872

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY SALERNO, *et. al.*,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL E. TIGAR*
727 East 26th Street
Austin, Texas 78705
(512) 471-6319

GUSTAVE H. NEWMAN
NEWMAN & SCHWARTZ
641 Lexington Avenue
New York, New York 10022
(212) 308-7900

*Counsel of Record

QUESTION PRESENTED

Whether the Second Circuit properly applied familiar principles of federal evidence law in holding sworn former testimony admissible against the government in a criminal case when the issues were identical and the government had both motive and opportunity to cross-examine, within the settled meaning of Federal Rule of Evidence 804, when the former testimony was given.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Matthew Ianniello, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward J. Halloran, Aniello Migliore, and Alvin O. Chattin were parties in the court of appeals.

TABLE OF CONTENTS

Table of Contents

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

PRELIMINARY STATEMENT

Petitioner has misstated "fact" and "law," Supreme Court Rule 15.1. Its "modest proposal" would wreak a major change in the settled rules applied every day by federal courts in admitting former testimony. In summary, the petition:

I. Omits the factual context in which the Court of Appeals' unremarkable holding on the hearsay rule was issued,[1] including the story of how the prosecutors invited this result by their deliberate litigation choices in this and an earlier case;

II. (a) Misreads the plain text of Federal Rule of Evidence 804;

(b) Ignores the settled common law hearsay principles embodied in Rule 804 and sensibly applied by the Court of Appeals;

(c) Ignores the constitutional issues lurking in hearsay decisions in criminal cases;

(d) Invites this Court to turn back the clock on hearsay law to well before the Federal Rules of Evidence were adopted and announce a rule that would bar hearsay of a type routinely received in evidence by federal courts;

III. (a) Invents an *inter*circuit conflict where none exists;

(b) Misrepresents the views of a distinct minority of Second Circuit judges in an apparent effort to conjure an

---

[1] In this brief, we cite the Court of Appeals opinion to the petition appendix. This helps distinguish this case from an earlier *United States v. Salerno*, 868 F.2d 524 (2d Cir. 1989) ["*Salerno I*"].

conflict, though (i) no such conflict exists and (ii) the certiorari process is not the means to address it if it did exist;

IV. (a) Asks the Court to overturn settled principles of hearsay law by summary action; and

(b) Fails to acknowledge that the Court of Appeals judgment reflects its concern with a number of serious prosecutorial and judicial errors in the trial of this case.[2]

REASONS FOR DENYING THE WRIT

I
THE GOVERNMENT'S ADMISSIONS AND DELIBERATE TACTICAL CHOICES LED TO THE RESULT BELOW

This megatrial was, as the Court of Appeals found and the government now concedes, in reality four cases: 16 of 41 alleged RICO predicates dealt with bid-rigging in the construction industry, while substantial parts of the indictment alleged (a) fraud against the Teamsters Union, (b) labor payoffs, (c) a hot dog and buns extortion scheme at the Zoo and elsewhere, (d) gambling and loansharking, and (e) an alleged murder. The jury deliberated over several days and returned guilty verdicts on the bid-rigging counts and the hot dog case, acquitted on the murder charges, and returned mostly acquittals with a sprinkling of guilty verdicts on the Teamsters, labor, and gambling/loansharking charges. Petition, at 3, 6a - 11a.

[2] The petition is limited to a single issue. The Court of Appeals had before it dozens of reversible error points, the resolution and significance of which it would have to address if its Federal Rule of Evidence 804 conclusion were overturned.

In the construction part of the case, the government alleged that some defendants created a club of contractors who rigged bids on ready-mix concrete jobs and paid a percentage on each job to the defendants.

The Petition itself concedes that existence of and membership in the "club" were hotly disputed issues. The government had some intercepted conversations that it claimed supported its theory; none of these interceptions captured the voice of respondent Vincent DiNapoli, even though the goverment alleged he was a key figure in the alleged "club." Some contractors gave Fed. R. Evid. 801(d)(2)(E) testimony that "they had been informed . . . Cedar Park was a member" of the "club." A hearsay document of questionable authenticity and authorship purported to show that some defendants had an interest in Cedar Park. Petition, at 4.[3]

Given the hot dispute on a key factual issue, one would expect the defendants to seek out all relevant and potentially admissible evidence that might raise a reasonable doubt. But the government's petition minimizes the series of its own deliberate tactical decisions that led the defense to lay a basis for admitting the Bruno and DeMatteis testimony.

[3] On appeal, the defense attacked the admissibility of this document on the grounds, among others, that the authenticating handwriting "expert" had been rejected as an expert in prior judicial proceedings, was trained as an accountant, was not a member of the professional societies of questioned document examiners, and had based her opinion mainly on a photocopy of the questioned document. *See* Tr. 9872-98; *United States v. Wolfson*, 297 F. Supp. 881, 890 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 804 (2d Cir. 1969) (rejecting testimony of this witness).

The government concedes Bruno and DeMatteis were principals in Cedar Park, the very company at issue.[4] They had firsthand nonhearsay knowledge. DeMatteis is a successful builder with an excellent reputation. Neither Bruno nor DeMatteis has ever been charged with any wrongdoing in connection with an alleged "club." Neither has been charged with lying to the grand jury or to anybody else, despite the petitioner's cavalier characterization of their grand jury testimony as contrary to "clear evidence."

The petition admits, p. 3, the *government* informed the defendants before trial that Bruno and DeMatteis had testified before the grand jury under immunity and might have exculpatory information. So it was the government and not the defendants who first said in this case that these two men might have information a jury should consider.

The government leaves out of this concession a further compelling fact about its tactical choices. In an earlier trial, *Salerno I*, 868 F.2d 524, 542 (2d Cir. 1989), the government told defense counsel of Bruno and clearly knew of DeMatteis. At that trial, defense counsel did not subpoena Bruno, did not seek admission of the grand jury testimony, and did not establish that either man would invoke a privilege against self-incrimination. The government successfully argued to the Second Circuit that all these steps were necessary predicates to defense use of any exculpatory information Bruno or DeMatteis might have provided. 868 F.2d at 542. In addition, the DeMatteis testimony was held excludable because it did not

[4] DeMatteis has been described also as a principal in Metro Concrete. *See Salerno I*, 868 F.2d at 542.

relate to the same "issue" as that on which the *Salerno I* defendants were being tried.[5]

In this case, by contrast, the defense fulfilled all the predicates, as the Court of Appeals found. The district court's memorandum refusing to admit the evidence was based solely on its view that the government had not had "similar motive." Petition, at 42a-52a.

Given petitioner's repeated concessions on the importance of Cedar Park to its cause, traditional principles of evidence law, criminal procedure, and Sixth Amendment jurisprudence point towards admissibility and not away from it.[6]

II

THE PETITIONER HAS MISREAD THE PLAIN TEXT OF FEDERAL RULE OF EVIDENCE 80, AND IGNORED ITSCOMMON LAW BACKGROUND AND CONSTITUTIONAL BASIS

Rule 804 codifies a former testimony hearsay exception dating at least to the 19th century. See 5 Wigmore, Evidence § 1370 (Chadbourn rev. 1974) ["Wigmore"]); *Motes v. United States*, 178 U.S. 458, 471-73 (1900), cited with approval, *Pointer v. Texas*, 380 U.S. 400, 407 (1965). The petition is

[5] Here, the issue was whether Cedar Park was in the "club" and DeMatteis squarely negated that assertion. This shows that the Second Circuit is well aware of the similar issue requirements of Rule 804.

[6] We discuss these principles below, at II.

couched in terms of grand jury testimony offered by an accused.[7] The Rule, however, is much broader, and the sort of drastic limitation proposed by the government will have a decisive impact on civil, as well as criminal, cases in which former testimony is routinely admitted.[8]

The Court of Appeals amended its opinion to make clear that it was ruling solely on Rule 804(b)(1). Petition, at 41a. The distinct minority of active judges who dissented from denial of rehearing limited their concern with the amended opinion to the possibility that another panel of the court "might in the future" broaden the narrow reach of this panel's ruling. The prospect that a limited holding might be misapplied by a future court is hardly the stuff of which certiorari petitions should be made.[9]

In addition to unavailability, with which we deal below, Rule 804(b)(1) requires that the former testimony possess every guarantee of trustworthiness required by the adversary system except one: that the declarant be present in court before the

[7] Cases having to do with the government's attempted use of grand jury testimony are irrelevant to the issue presented by the petition, for by definition the accused can never have an "opportunity" to cross-examine such testimony. See Petition, at 21a (citing cases).

[8] Only a few Rules of Evidence make a distinction between civil and criminal cases, *e.g.*, Rules 201(g), 803(8)(C), usually in implied recognition of the defendants' Sixth Amendment and due process rights.

[9] At last count, there were twelve active judges in the Second Circuit eligible to vote on en banc rehearing. Only four of them voted to rehear. This is not even a majority of the non-panel members on the Court of Appeals.

trier of fact. The oath, personal knowledge[10], and the opportunity for cross-examination must all have been present. The justification for the former testimony exception, now as under pre-Rules caselaw, is necessity -- among the most venerable of justifications for dispensing with viva voce testimony. Wigmore finds the principle stated in Shakespeare. Wigmore § 1364, at 23-24.[11]

The Advisory Committee Notes to Federal Rule of Evidence 804(b)(1) state, "it may be argued that former testimony is the strongest hearsay" because all that is missing is presence. The Rule continues the limitations on the use of former testimony largely due to "tradition, founded in experience." *Id.*

Petitioner makes, and urges upon this Court, three fundamental -- indeed, elementary -- errors of law in discussing the former testimony exception. It misconstrues the term "opportunity," the term "similar motive," and the concept of "unavailability."

[10] All hearsay declarants must have personal knowledge. See Advisory Committee Notes to Federal Rules of Evidence 803, 804.

[11] Indeed, there is venerable authority that once there has been a chance at cross-examination by a party, the statement is thereafter nonhearsay and entitled to be admitted with the same dignity as if given again from the witness stand. Wigmore § 1370.

A. Opportunity to Cross-Examine

Bruno and DeMatteis were before the grand jury. They were given immunity, based on a decision by an Assistant Attorney General or some other high officer listed in 18 U.S.C. § 6003(b) that "their testimony or other information . . . may be necessary to the **public** interest [emphasis added]."[12] Petitioner presents a series of hypothetical reasons why it could have made, and did make, a deliberate tactical decision not to conduct a full examination of Bruno and DeMatteis in the grand jury.[13] These reasons are factually specious and legally irrelevant.

1. Petitioner's Factually Specious Arguments

An immunized witness may escape punishment altogether for any past wrongs he or she confesses. *See, e.g., United States v. Poindexter*, ___ F.2d ___, 1991 WL 235749 (D.C. Cir. 1991). The only prospect of temporal punishment that tethers such a witness to the truth is of a prosecution for perjury, as provided in 18 U.S.C. § 6002. Yet, as Chief Justice Burger taught in *Bronston v. United States*, 409 U.S. 352 (1973), in order to prosecute a witness for perjury, the examiner must tie him or her to the allegedly false story firmly

[12] Construing another part of the crime bill that brought us use immunity, this Court has said that the critical requirement of high official certification cannot be minimalized or trivialized. *United States v. Giordano*, 416 U.S. 505 (1974).

[13] In the discussion below, we show that the government's argument about "motive" to cross-examine is wholly fanciful. We refer to the grand jury interrogation of Bruno and DeMatteis as cross-examination because of their status as immunized witnesses objectively hostile to the prosecutors. See Fed. R. Evid. 609(c).

enough that the government can prove at a perjury trial that the witness spoke contrary to his or her belief.

Unless the grand jury process is a simply a school for uncorrected perjury by immunized witnesses, it is nonsense to claim the government has no reason to pin down a witness whose story it doubts.

Moreover, one searches the petition in vain for any reference to Federal Rule of Evidence 806, which would have permitted the government the same latitude in attacking Bruno and DeMatteis had their declarations been received as if they had taken the stand.[14]

2. Petitioner's Legally Irrelevant Arguments

Rule 804(b)(1), like its common law antecedent, makes it irrelevant why a party against whom hearsay is now offered did not cross-examine on the prior occasion. The reason can have been fanciful, or -- as claimed here -- to have involved the most serious concerns of prosecutorial discretion. Wigmore teaches us, first, that "the mere speaking under oath is not sufficient; the essential condition is that the person against whom the sworn statement is offered should have had an *opportunity to cross-examine* the deponent . . . . This is universally conceded as a common-law principle." Wigmore § 1377 (emphasis in original).

Equally strongly, however, Wigmore says, "The principle requiring a testing of testimonial statements by cross-examina-tion has always been understood as requiring, not necessarily an actual cross-examination, but merely an

[14] The government said in *Salerno I* that it would hand Bruno's grand jury testimony to the defense if he were called as a witness. 868 F.2d at 542 n.7. It backed down on this position in the present case.

opportunity to exercise the right to cross-examine if desired.... In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness. This doctrine is perfectly settled." *Id.* at § 1371. So, far from being questionable, Rule 804(b)(1) and the Court of Appeals' interpretation of it are "perfectly settled."

This Court has also treated the issue, forcefully and repeatedly, in criminal cases. We refer, of course, to the line of cases beginning with *California v. Green*, 399 U.S. 149 (1970), which found no constitutional objection to applying rules like 804(b)(1) to admit at an accused's trial testimony taken at a preliminary examination, provided only that the accused had the *opportunity* -- through counsel -- to cross-examine and the witness was unavailable for in-person examination at trial.[15]

The government has proposed a rule that would unsettle *all* this law, for parity in the right to introduce evidence is one foundation of the Sixth Amendment. *See generally* P. Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567 (1978); P. Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 95 (1974). The government does not propose, nor could it rationally, a rule that would permit introduction of prosecution-selected former testimony while excluding that offered by the defense under identical circumstances.

---

[15] The opportunity to cross-examine must have been meaningful in the sense that the accused was represented by counsel. *Pointer v. Texas, supra.* The unavailability principle is strictly enforced. *Barber v. Page*, 380 U.S. 719 (1968); *Motes v. United States, supra*, 178 U.S. at 472-73. Subject to these limitations, however, the principle dates at least to the 19th Century.

Any defense lawyer will tell you there are a dozen reasons not to conduct a vigorous cross-examination of preliminary hearing witnesses. Preliminary hearing strategy is usually to hide behind the log and see what evidence the government brings out. But if one of those witnesses dies, or leaves the country, or shows up at trial and invokes a privilege against self-incrimination, Rule 804(b)(1) and this Court's cases say the former testimony will probably come in.[16]

The government cannot legitimately claim surprise that a venerable common law rule has been applied against it. If it made a deliberate decision to forego some cross-examination of Bruno and DeMatteis, knowing full well they had given testimony that exculpated these defendants on an important issue, it must bear the consequences of its own deliberate bypass, its own procedural default.

Indeed, the Advisory Committee Notes to Rule 804(b)1) state that "[a]n even less appealing argument [for excluding the hearsay] is presented when the failure to develop fully [on cross-examination] was the result of deliberate choice."

One need not go back to the 19th Century to find settled law on this point which would alert a careful prosecutor of the consequences of tactical choices to forego examination. *United States v. Pizarro*, 717 F.2d 336 (7th Cir. 1983), was cited by the district judge, Petition, at 50a, in rejecting the defense motion to admit the former testimony.

The government does not cite Pizarro in its petition. Yet it is a case from the Seventh Circuit, the rationale of which

---

[16] *See also Glenn v. Dallman*, 635 F.2d 1183 (6th Cir. 1980), *cert. denied*, 454 U.S. 843 (1981) (preliminary hearing transcript comes in against defendant because defense counsel had a chance to conduct vigorous cross-examination but did not do so).

is in perfect agreement with that of the Second Circuit and which reverses a conviction for wrongful exclusion of the former testimony.

The government cites *United States v. Powell*, 894 F.2d 895 (7th Cir.), *cert. denied*, 495 U.S. 939 (1990), which it claims "conflicts with" the Second Circuit's decision in this case. *Powell* is irrelevant because the "testimony" was given at a plea hearing where the right to "cross-examine" does not exist in the sense required by the former testimony rule. This citation, coupled with petitioner's failure to discuss *Pizarro*, is misrepresentation.

Pizarro was tried three times. At his second trial, a codefendant named Rodriguez identified somebody other than Pizarro as the source of heroin. At the third trial, Rodriguez invoked his privilege. Pizarro offered the former testimony. Rodriguez was concededly unavailable. The Court of Appeals listened to the government's argument that it had foregone vital cross-examination in the earlier trial and held, after extensive analysis, that Rule 804(b)(1) required admitting the hearsay.[17]

So, the Court of Appeals' analysis of "opportunity" in this case was well within the bounds of Rule 804(b)(1) and the discretion exercised every day by experienced judges.

B. **"Similar Motive"**

The government directs much fire at the Court of Appeals' rejection of its "no similar motive" argument. It fails to understand that the argument is, in this context, trivial.

[17] The opinion was written by District Judge Neaher of the Eastern District of New York, sitting by designation. It bears noting that all the judges on the panel in this case were former federal trial judges, quite accustomed to making hearsay rule decisions on a common sense basis.

The old common law rule was that former testimony could be offered only against a party to the prior proceeding. Advisory Committee Notes to F.R.Evid. 804(b)(1). The rule was then expanded to permit introduction against those "in privity" with the party-opponent. *Id.* The Federal Rules of Evidence sought, in this as in so many other ways, to free the hearsay rule from artificial restrictions having no bearing on the intrinsic reliability of the declaration. *Id.*

In keeping with this expansive view, Rule 804(b)(1) permits a party to introduce former testimony against an opponent who was not even present at a former proceeding, provided only that the former opponent had "the right and opportunity to develop the testimony with similar motive and interest" to the opponent against whom it is now offered. *Id.*

Bluntly put, when former testimony is offered against the same party who once had a chance to cross-examine, the question of "similar motive" is irrelevant, provided the issues in the former proceeding and the present one are substantially identical.[18] The Court of Appeals in this case, and all the Courts of Appeals cases cited by petitioner, recognize and apply this unremarkable common-sense principle.

The only argument the government could make, consistent with the Rule and its official commentary, is that it lacked similar motive because the issues were completely dissimilar in the grand jury and at this trial. It did not make this argument. It could not do so with a straight face, because (a) the factual recitation in its petition dramatically illustrates that the issues were identical; (b) it represented to the Court

[18] The petition's statement, 13 n.6, that a statutory construction treatise is the "only authority" for the proposition that "similar motive" is irrelevant is belied by reading the Court of Appeals' opinion.

and counsel in a Brady submission that the former testimony was exculpatory, and (c) it characterized the testimony in *Salerno I* as not bearing an issue identical to the one in that case, in terms which foreclose it in the present case.

Some older cases took a narrow view of the requirement that issues and parties be identical. Wigmore and other authorities derided these limitations, Wigmore §§ 1387 (issues), 1388 (parties), and the Rule dispenses with them.[19] The Advisory Committee that drafted the rule intended the very sort of interpretation the Second Circuit used in this case, in harmony with what the Committee called the "modern decisions."

We can illustrate the havoc the government's proposed rewriting of Rule 804(b)(1) would wreak by describing a typical multidefendant civil antitrust case. Plaintiff notices the deposition of an officer of Defendant A. Counsel for Defendants A, B, C, and D show up and "defend" the deposition by interposing objections. Often, they ask no questions. They count on being able to call the witness at trial, so the deposition will be used only for impeachment. After all, millions of dollars may be at stake in the litigation, and asking questions would only give away the defense strategy.

As every civil lawyer knows, this all works just fine until Defendant A settles and won't make the witness (who we will suppose lives outside the civil subpoena range) available, or the witness dies, or maybe (in an antitrust case) the witness decides that the privilege against self-incrimination isn't such a bad idea after all.

---

[19] Distinguished courts had already begun to chip away at the common law restrictions. *See, e.g., Fleury v. Edwards*, 14 N.Y.S.2d 334, 200 N.E.2d 550 (1964) (Fuld, J.).

The government wants to read Rule 804(b)(1) so that Defendants B, C, and D have a good argument for keeping the deposition out of evidence. This is nonsense.

C. "Unavailability"

So far, we have shown that the Court of Appeals' decision represents a sensible and limited approach in terms of Rule 804(b)(1) itself. Even if one were to say that Bruno and DeMatteis were unavailable to the government, settled law makes their former testimony admissible. The Court of Appeals' view that they were *not unavailable* to the government was not necessary to such a conclusion.

Nonetheless, the Court of Appeals was right, and the government jumps over a lot of law in saying otherwise. It reserves its most ardent sarcasm for the Court of Appeals' treatment of "unavailability." Yet that treatment deliberately and expressly (a) excludes from consideration cases in which grand jury testimony is offered by the government, and (b) does not construe the residual exception in Rule 804(b)(5) or any other portion of Rule 804(b).

The government seems most exercised at the panel's use of general statutory construction principles in deciding the meaning of unavailability. Yet, given the plain language of Rule 804(a) and its common law background, such authority is precisely where one must turn.

As the Advisory Committee Notes make clear, unavailability was not the subject of consistent doctrine before the Rules. The drafters unified the standards, although recognizing that a defendant's Sixth Amendment confrontation rights would lead to differential treatment of civil and criminal cases and -- in the latter -- as between criminal defendants and the government. As we said above, the drafters considered eliminating

the unavailability requirement altogether for former testimony. *Id.*

1. **The Constitutional Issue**

The Court of Appeals did not reach the constitutional issue. The government ignores it. To say this hearsay is inadmissible requires resolving that issue against the defense in the teeth of this Court's decisions. No rule of evidence may be construed to exclude reliable hearsay offered by a defendant who requires the evidence for his defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973), discussed and analyzed in P. Westen, *supra*.

This is a particular application of a general rule forbidding use of evidence rules to preclude presentation of evidence in support of a defense theory. *Compare Davis v. Alaska*, 415 U.S. 308 (1974) (state may not invoke juvenile record sealing rule to cut off cross-examination of prosecution witness). *See generally* W. LaFave & J. Israel, Criminal Procedure § 23.3 (1985).

2. **Unavailability in Context**

The Rule speaks of "unavailability." Unavailability to whom? Because the admission of the former testimony rests on "necessity," the proponent must generally show unavailability *to himself* of the live testimony. *Compare* Wigmore § 1414. For example, if a witness called by the government decides, through fear of or connivance with the defendant, not to testify, that witness is unavailable in the only way the rule requires, and a prior hearsay statement will be received. *See* 4 Weinstein & Berger, Federal Rules of Evidence ¶ 804(a)[01], at 804-36 n.8 and accompanying text.

The cases cited in the Weinstein-Berger treatise represent application of the same principle applied by the Court

of Appeals in this case. The fearful or conniving witness is not unavailable to the defendant, who can with a few well-chosen words secure his testimony. The government's proposed double unavailability principle has no basis in the Federal Rules of Evidence, invites evidentiary gamesmanship in civil and criminal cases, and harkens back to the rigid "same case" and "same parties" limits ridiculed by every discerning commentator since Bentham and abolished by the Rule.

The petition says, at 20, that the Court of Appeals' decision will somehow force the government to grant immunity "as the price of having the courts apply the rules of evidence according to their terms." The Second Circuit expressly reaffirmed cases holding immunity grants "pre-eminently a function of the Executive Branch." Petition at 23a. So the petition contends, unsupported and unsupportably, that the Court of Appeals did not mean what it plainly said.

Nothing in the Court of Appeals' opinion compels an immunity grant. The government has already, under the Court of Appeals' test, had the opportunity to cross-examine the former testimony on the same issue. If the proponent does not establish these two predicates, the former testimony would be inadmissible.[20] The government may, but is not compelled to, grant immunity only if it wants more cross-examination than the rule entitles it to, and more than any other litigant would be entitled to.

In civil cases, admission of the deposition of a corporate officer outside the subpoena range should turn on the officer's unavailability to the proponent. Obviously, the officer is not unavailable to the corporate defendant. Yet the deposition is

---

[20] These predicates are preliminary facts. Fed. R. Evid. 104.

admissible. Again, this is the principle the Court of Appeals applied.

The rule cannot be read otherwise. The last paragraph of 804(a) says that "the proponent" cannot take advantage of an unavailability obtained by his or her procurement or wrongdoing.[21] The rule is silent as to the role and responsibility of the opponent, and the Court of Appeals sensibly declined to go any further than the text required and properly cited a general principle of statutory construction.

If one does go beyond the rule's text, into its common law antecedents and constitutional underpinnings, the same result follows. The state may not intimidate a witness and make him unavailable. *Webb v. Texas*, 409 U.S. 95 (1972). The state may not use hearsay until it tries every discretionary means to obtain live testimony. *Compare Barber v Page, supra*, with *Ohio v. Roberts*, 448 U.S. 56 (1980).

The Court of Appeals did discuss the fairness and common sense of its holding. After all, this Court and the Courts of Appeals have developed a substantial body of criminal procedure law on use of hearsay in criminal cases. This law is based on two principles, necessity and reliability, whether the hearsay is offered by the state or by the accused. *Compare Chambers v. Mississippi, supra*, with *Ohio v. Roberts, supra*. The petition does not mention any of this significant

---

[21] This requirement is of constitutional dimension in criminal cases. *See Motes v. United States, supra*. In *Motes*, the hearsay was inadmissible because the government negligently let the witness escape custody and become unavailable. There was no showing of culpable wrongdoing. By a parity of reasoning, the Court of Appeals need not have found culpability by the government to hold the witness not unavailable to it.

caselaw; it merely argues for a rule that would put it all into question.

III

THERE IS NO INTERCIRCUIT CONFLICT

Petitioner says, at 15-16, that the Seventh, Third, Fifth, and D.C. Circuits hold differently. This assertion is nonsense.

In a footnote, 15 n.9, petitioner also says the Second Circuit is at odds with itself. In *United States v. Serna*, 799 F.2d 842 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987), the defendant sought to introduce the testimony of his alleged coconspirator at the latter's trial. The Court of Appeals held the government had not had a similar motive to examine the coconspirator because the contested issues were different. In this case, the Court found the issues were the same; the petition's own statement of facts supports this view. In *Salerno I*, the Court held the same hearsay properly excluded, in part because the issues were not the same.

The Second Circuit seems to know what it is doing on this issue, even granting the novel premise that certiorari is a means to resolve *intra*circuit conflicts.[22] The four judges who wanted en banc reconsideration ended their dissent with a clear statement that they were more worried with what the decision might be read as permitting than with what it held. Such prospective concerns are hardly the basis for exercise of certiorari power.

---

[22] Judge (now Chief Judge) Oakes authored *Serna*. Had he thought the opinion endangered by this panel's holding, he presumably would have voted to rehear en banc. He did not.

tation. The other allegedly conflicting decisions are also not as claimed.

In *United States v. Lowell*, 649 F.2d 950 (3d Cir. 1981), the properly excluded hearsay was a guilty plea allocution sufficient to make a Fed. R. Crim. P. 11 factual basis. As the Third Circuit noted, there was no cross-examination at all to speak of, and no similarity of issues.

The same is true of the Fifth Circuit's opinion in *United States v. Atkins*, 618 F.2d 366 (5th Cir. 1980). The issues in the two proceedings were different.

Thus, in the Seventh, Third, and Fifth Circuit cases, the former cross-examination could not be a substitute for present cross-examination. It is astonishing that the government should cite these cases at this procedural hour, for it never claimed in the Court of Appeals or the district court that DeMatteis' and Bruno's grand jury appearance involved an issue different from that on which the hearsay was offered at trial in this case. Indeed, one reads the petition in vain to find any such contention in this Court.

The citation to *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 2235 (1991), is similarly malapropos. Exclusion of Poindexter's videotaped Congressional testimony was based on the evident principle that the Congressional hearing "opponent" was different from the North trial "opponent." Indeed, North's prosecutors had been forbidden to have anything at all to do with the Poindexter examination or even to watch it on television. 910 F.2d at 906.

The cases cited in the petition, at 17, are, broadly speaking, based on the same rationale as the Court of Appeals' decision here.

IV
THE SUGGESTION OF SUMMARY ACTION IS GROUNDLESS

The Court of Appeals' opinion in this case was written after the panel of experienced federal judges had read several hundred pages of briefs that did not duplicate one another's discussion, heard three hours of argument by eight advocates, and reviewed a record many thousands of pages long that led to joint appendices running to more than one thousand pages. Petition, at 13a-14a.

The portion of the opinion dealing with hearsay discusses all relevant prior Second Circuit law, including *Salerno I* (Judge Pratt on the panel), which dealt with the same testimony here at issue and found it properly excluded. The Court of Appeals also discusses the law of other circuits, the relevant cases from this Court, and leading treatises and articles.

The suggestion, Petition at 23, that summary reversal (without review of the record and full argument) is appropriate is a studied insult to the deliberative process.

The insult is compounded when one considers that the government's proposed rule would cut across the entire field of former testimony as now offered in federal trials. It is surprising to see the government trying to turn the clock back to rigid and technical rules that prevent a jury from hearing reliable evidence on the merits, when the Federal Rules of Evidence are expressly consecrated to different principles. Fed. R. Evid. 102.

There is, perhaps, a further lesson to be drawn from reading the Second Circuit's opinion. In this megacase, the pattern and enterprise requirements of RICO were stretched to

and perhaps beyond the breaking point. The most disparate charges against different defendants were patched together to create a trial that enhanced the possibility of jury confusion and prejudicial spillover. *See* Petition, at 2a-11a.

The district judge cut off one defendant's right of effective cross-examination and excluded another defendant from pointing out that the government had taken two diametrically opposed positions in two cases in which he was involved. There was a serious issue of judicial and court officer interference with jury deliberations, as to which the panel expressed grave reservations about the district judge's equivocal denial of wrongdoing.

CONCLUSION

This case possesses none of the qualities that invoke the certiorari jurisdiction: the Court of Appeals' unremarkable holding rests on routinely applied principles of evidence law, and no Court of Appeals disagrees with the Second Circuit's rationale. The petition is rife with errors and omissions. Certiorari should be denied.

Respectfully submitted,

MICHAEL E. TIGAR
727 East 26th Street
Austin, Texas 78705

(3)

No. 91-872

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-872

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent asserts that we have "misstated 'fact' and 'law,'" (Br. in Opp. 1), that we "[m]isread[] the plain text of Federal Rule of Evidence 804" (*ibid.*), that we "[m]isrepresent[] the views of a distinct minority of Second Circuit judges," (*ibid.*), that our contentions concerning the failure to develop the testimony of Bruno and DeMatteis are "factually specious" and "nonsense" (*id.* at 8, 9), that our argument is "trivial" (*id.* at 12), and that our suggestion that the court of appeals' departure from the clear terms of Rule 804(b)(1) warrants consideration of summary reversal constitutes "a studied insult to the deliberative process" (Br. in Opp. 21). Aside from those derogatory characterizations, however, respondent conspicuously fails to defend the court of appeals'

holding that the "similar motive" requirement of Federal Rule of Evidence 804(b)(1) is "irrelevant" when the declarant is unavailable by virtue of his invocation of his Fifth Amendment privilege against compulsory self-incrimination. Rather than support the court of appeals' decision to read the "similar motive" requirement out of Rule 804(b)(1) under such circumstances, respondent simply argues that the government had such a motive in this case, and then contends that the decision of the court of appeals does not present a circuit conflict or a basis for summary reversal.

1. Respondent argues that, because the government had an "opportunity" to examine Bruno and DeMatteis in the grand jury, that requirement of Rule 804(b)(1) was satisfied. Br. in Opp. 8-12. At no point, however, have we suggested anything to the contrary. Our claim in the district court, the court of appeals, and this Court has consistently been that the government lacked a "similar motive" to examine the two witnesses in the grand jury, and that their grand jury testimony therefore should not have been held admissible under Rule 804(b)(1).[1]

[1] Respondent reads *California* v. *Green*, 399 U.S. 149 (1970), to suggest that the inquiry under Fed. R. Evid. 804(b)(1) should be limited to whether the opponent of the testimony had the "opportunity" to examine the declarant at the prior proceeding. See Br. in Opp. 10. *Green*, however, addressed the Confrontation Clause rights of a defendant against whom prior testimony had been offered, not the evidentiary rules governing the admissibility of such testimony. Although, as respondent contends, there is "no constitutional objection to applying rules like [Rule] 804(b)(1) to admit at an accused's trial testimony taken at a preliminary examination," Br. in Opp. 10, that fact does not bear on the question presented here: whether the rules of evidence *require* the admission of such testimony, where the opponent had the opportunity, but not the motive, to develop it when it was originally given.

Addressing the question whether the government had a "similar motive" to develop the testimony of Bruno and DeMatteis before the grand jury, respondent suggests that, because the "issues" in the grand jury were the same as those at trial in this case, the government's motive to develop their testimony before the grand jury was "similar" to its motive to impeach that testimony at trial. Br. in Opp. 12-15. That claim finds no support in the record, or in the court of appeals' decision, which explicitly stated: "[W]e agree that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis." Pet. App. 19a. When Bruno and DeMatteis testified before the grand jury, the need to pursue, and maintain the security of, the grand jury's on-going investigation was the critical concern that underlay the government's decision to allow them to testify without serious challenge. That concern would have had little impact on the government's motive to cross-examine Bruno and DeMatteis had they testified at trial. The district court satisfied itself that the government's motives in the grand jury were not "similar" to those at trial (Pet. App. 51a), and respondent offers no reason to question that finding.[2]

[2] Respondent appears to believe it to be of substantial importance that, under the Federal Rules of Evidence, "[t]he old common law rule * * * that former testimony could be offered only against a party to the prior proceeding * * * was * * * expanded to permit introduction against those 'in privity' with the party-opponent." Br. in Opp. 13. We have never disputed respondent's claim that the government was

2. The court of appeals' conclusion that the grand jury testimony of Bruno and DeMatteis was admissible at trial under Rule 804(b)(1) rested not on any finding of "similar motive," but on the rationale that the requirements of Rule 804(b)(1) were "irrelevant" because the government, through its power to immunize, could have made the two witnesses available at trial. Pet. App. 24a. Other than to protest that "[n]othing in the Court of Appeals' opinion compels an immunity grant" (Br. in Opp. 17), however, respondent does not even attempt to defend that rationale. Nor does he persuasively explain why the court's decision is not in conflict with cases from other circuits, which have declined to use the government's immunity power as a basis for disregarding its lack of motive to cross-examine a declarant whose prior testimony has been proffered under Rule 804(b)(1). See Pet. 15-17 (citing cases). While respondent would distinguish such cases from the Third, Seventh, and Fifth Circuits by noting that the prior proceedings in those cases involved "different issues" (Br. in Opp. 19-20), at no point in its opinion did the court of appeals here ground its decision on any similarity

---

a party to the grand jury proceedings; the dispute in this case involves only the "similar motive" prong of Rule 804(b)(1). We note, however, that respondent's statement concerning identity of parties under Rule 804(b)(1) is misleading. The Federal Rules relax the requirement that the opponent of the testimony have been a party to the prior proceeding *only in civil cases*. See Fed. R. Evid. 804(b)(1) (former testimony not excluded "if the party against whom the testimony is now offered, *or, in a civil action or proceeding, a predecessor in interest*, had an opportunity and similar motive to develop the testimony") (emphasis added). This case does not arise out of a civil proceeding.

between the issues in the grand jury and those presented at trial. Similarly, respondent is simply wrong to claim that "[t]he cases cited in the petition, at 17, are, broadly speaking, based on the same rationale as the Court of Appeals' decision here" (Br. in Opp. 20). None of the cited cases, which concerned the admissibility of prior grand jury testimony against the government under Rule 804(b)(1), based its conclusion on the government's ability to make the declarant available through a grant of immunity.

3. Respondent accuses the government of "trying to turn the clock back to rigid and technical rules that prevent a jury from hearing reliable evidence on the merits." Br. in Opp. 21.[3] As our petition makes

---

[3] Similarly, respondent asserts that "the sort of drastic limitation proposed by the government will have a decisive impact on civil, as well as criminal, cases in which former testimony is routinely admitted." Br. in Opp. 6. The only limitation for which we have argued is the limitation embodied in the text of Rule 804(b)(1)—that the party against whom the testimony is offered have had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Respondent advances no reason to believe that adherence to the terms of Rule 804(b)(1) would alter current practice in civil or criminal cases in the federal courts.

Respondent asserts that "Rule 804(b)(1) and this Court's cases say" that testimony at a preliminary hearing will "probably come in" at trial against a defendant. Br. in Opp. 11. We are unaware of any authority bearing on the question of how often preliminary hearing testimony is admitted or excluded when offered at trial against a defendant. In any event, however, the legal principles governing admission of such testimony against a defendant are identical to those governing admission of any former testimony against any party, including the government. If the opposing party had an opportunity and motive to develop the testimony in the prior proceeding—and if the testimony meets the other re-

clear, we seek only to enforce the terms of an evidentiary rule that demands a fact-sensitive inquiry into "motive" and "opportunity," and to overturn a decision that pretermits that inquiry, in disregard of the unique concerns of a prosecutor who places a hostile witness in the grand jury.[4]

Respondent also refers to "the government's proposed double unavailability principle." Br. in Opp. 17. We have proposed no such principle; a declarant is unavailable if he meets the criteria stated in Rule 804(a), among which is "exemp[tion] by ruling of the court on the ground of privilege." Fed. R. Evid. 804(a)(1). We have never disputed that Bruno and DeMatteis were unavailable at trial under that definition. Our quarrel with the court of appeals centers on the court's conclusion that, having determined that the declarants were "unavailable" in the above sense, the court felt that their "availability" to the government, the opponent of the testimony, by virtue of a

quirements of Rule 804(b)(1)—it is admissible; otherwise, it is not. It is the court of appeals that has departed from that principle by requiring a showing of similar motive when former testimony is offered against a defendant, but omitting that requirement when the declarant invokes his Fifth Amendment privilege and the testimony is offered against the government.

[4] While respondent suggests that the government's notification to defendants, pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), that Bruno and DeMatteis might have exculpatory material constituted a concession that "these two men might have information a jury should consider" (Br. in Opp. 4), the government's notification did not in any way suggest a readiness to waive any evidentiary objection to the admission of such information, nor did it constitute an admission that any testimony given by Bruno and DeMatteis was or would be truthful.

grant of immunity somehow rendered inapplicable the specific requirements of Rule 804(b)(1) governing admissibility of former testimony.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE, 1992 312324 45249

No. 91-872

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DANIEL C. RICHMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether Fed. R. Evid. 804(b)(1) authorizes admission against the government of the former testimony of a declarant who has been rendered unavailable by his assertion of his Fifth Amendment privilege, even though the government lacked any motive to cross-examine the declarant when the former testimony was given.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

Rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-872

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 937 F.2d 797. The opinion of the district court (Pet. App. 42a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. A petition for rehearing was denied on September 24, 1991. The petition for a writ of certiorari was filed on November 27, 1991, and was granted on January 21, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Evidence 804 provides, in pertinent part:

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant—

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

1. On April 7, 1987, a grand jury sitting in the United States District Court for the Southern District of New York returned a 35-count indictment against 11 defendants, including respondents Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, and Aniello Migliore. The indictment charged respondents with participating in the affairs of a racketeering enterprise known as the Genovese Organized Crime Family of La Cosa Nostra, and conspiring to do so, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d). Among the 41 predicate acts alleged to constitute the

pattern of racketeering activity were 16 predicate acts charging fraud in the construction industry. Other predicate acts charged respondents and four other defendants with fraud against the International Brotherhood of Teamsters, illegal payoffs, the attempted extortion of an individual, extortion and fraud in the food industry, participating in illegal numbers and bookmaking businesses, and loansharking. Pet. App. 6a-8a.

The trial began on April 6, 1987, and concluded 13 months later, on May 4, 1988. Much of the trial focused on the construction industry charges. The proof—based on extensive electronic surveillance and testimony by cooperating witnesses—showed that between 1980 and 1985 respondents endeavored to rig the bids for concrete superstructure work on virtually every high-rise building in Manhattan that used more than $2 million worth of concrete. Through its control over both construction unions and the supply of ready-mix concrete, the Genovese Family, acting in concert with other La Cosa Nostra families, created a "Club" of six concrete companies. In exchange for a payment of two percent of the contract price, the six companies were permitted to bid on large building jobs in Manhattan. The bids were rigged in accordance with an allocation of jobs by the Genovese Family and three other La Cosa Nostra families. Pet. App. 9a, 42a.

Prior to trial, pursuant to its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), the government informed respondents that Pasquale Bruno and Frederick DeMatteis had testified under immunity before the grand jury and might be sources of exculpatory testimony. Pet. App. 14a. The two were principals in the Cedar Park Concrete Construction Cor-

poration, which was alleged to be in the "Club." Before the grand jury, they had denied participating in or being aware of the Club scheme. Pet. App. 25a. During the trial, however, the government presented evidence that Cedar Park had been involved in the Club scheme and had ties to organized crime figures. Two other Club contractors testified that they had been informed by members of organized crime families active in the scheme that Cedar Park was a member of the Club. Tr. 6526-6528, 6561-6568, 8176-8177, 8324-8326. That testimony was corroborated by intercepted conversations among the conspirators and a document seized from a Genovese Family location, which indicated that the Family had a ten percent interest in Cedar Park. GX 429; GX 4100, at 4-5.

At trial, Bruno and DeMatteis appeared in response to defense subpoenas, but they invoked their Fifth Amendment privilege and refused to testify. Pet. App. 14a-15a. The government declined to immunize the two witnesses for purposes of trial, whereupon respondents asked that the witnesses' grand jury testimony be admitted under Fed. R. Evid. 804 (b)(1), the hearsay exception for prior testimony, or under Fed. R. Evid. 804(b)(5), the "catch-all" exception for unavailable declarants. In response, the government submitted sealed affidavits, in which it explained that it had "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear to be falsifying their testimony to assist Grand Jury targets or other witnesses." Pet. App. 19a.

The district court accepted the government's explanation and denied respondents' request to admit the testimony; the court held that, because the government did not have the same motive to question the two witnesses before the grand jury that it would have had at trial, the grand jury testimony was not admissible under Rule 804(b)(1). Pet. App. 42a-52a. The court stated that the materials submitted by the government "seriously undercut the truthfulness of the grand jury testimony and explain why the prosecutor did not pursue the witnesses, by way of cross-examination, in the grand jury." Pet. App. 51a. The court also ruled that, because the grand jury testimony lacked a "circumstantial guarantee of trustworthiness," it was not sufficiently reliable to be admitted under Rule 804(b)(5). Tr. 18,319.

At the conclusion of trial, respondents were convicted on the RICO counts and the substantive charges arising out of the construction industry fraud. In addition, various defendants were convicted on counts charging labor payoffs, gambling, loansharking, and bid-rigging in the food industry.[1] Pursuant to the jury's verdict, the court then ordered the forfeiture of various defendants' interests in a number of assets, including large construction and concrete supply companies in New York City. Pet. App. 9a-11a.

2. The court of appeals reversed all of respondents' convictions, holding that the district court had erred by refusing to admit the Bruno and DeMatteis grand jury transcripts at trial. The court concluded that the grand jury testimony of the two witnesses was "former testimony" under Fed. R. Evid. 804 (b)(1), and that the witnesses—by virtue of their invocation of the Fifth Amendment privilege—were

[1] Individual defendants were acquitted of the gambling and loansharking charges, as well as the mail fraud charges involving the national elections for the International Brotherhood of Teamsters. Pet. App. 38a-39a.

"unavailable" to respondents within the meaning of Fed. R. Evid. 804(a)(1). The court then addressed a further prerequisite for admission of former testimony under Rule 804(b)(1)—that "the party against whom the testimony [was] offered" had a "similar motive to develop the testimony by direct, cross, or redirect examination." While agreeing "that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis," Pet. App. 19a, the court held that "since these witnesses were available to the government at trial through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant." Pet. App. 21a; see Pet. App. 24a. The court concluded: "Since the witnesses were only unilaterally 'unavailable' and could have been subjected to cross-examination by the government [at trial], we will not countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government." Pet. App. 22a.

Having concluded that the district court erred in excluding the Bruno and DeMatteis grand jury testimony, the court of appeals ruled that, "[i]f this testimony had been believed, it is reasonably probable that the jury would have concluded either that no [concrete] 'club' existed, or at the very least that there was reasonable doubt as to its existence." Pet. App. 25a. The court therefore held that the error required reversal of the "Construction Case convictions." *Ibid.* Because it regarded the remaining counts and predicate acts as " 'barnacles' on the ship that was the Construction Case," the court reversed those convictions as well. *Ibid.*[2]

[2] The court of appeals found that respondent Auletta should have been permitted to introduce the government's jury arguments in a related prosecution in which Auletta was not a defendant. The court, however, did not base its reversal of Auletta's conviction on that ruling. Pet. App. 31a. The court also ruled that the limitations placed by the district court on cross-examination by defendant Ianniello deprived him of his right to present a defense and constituted reversible error. Pet. App. 26a-30a. Ianniello was not named in the construction charges, and the government has not sought review of the court of appeals' decision as to him.

3. After denying the government's petition for rehearing and suggestion for rehearing en banc, the court of appeals on November 6, 1991, modified its opinion (Pet. App. 40a-41a) by adding a single paragraph. The new portion of the opinion stated that the court had decided that "the testimony of Bruno and DeMatteis [was] available to the government but unavailable to the defendants." Pet. App. 41a. The court added that it had "not considered in this case, because the issue [was] not before us, whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)." *Ibid.*

4. On November 20, 1991, the court issued an order modifying its previous denial of rehearing en banc to note that Judges Newman, Kearse, Mahoney, and Walker dissented from that denial. Pet. App. 55a-56a. In an opinion (Pet. App. 57a-60a) filed the same day, Judge Newman, joined by the three other dissenting judges, argued that the court's "unprecedented" (Pet. App. 57a) ruling in this case was "fraught with serious implications for the conduct of grand jury investigations." Pet. App. 60a. Speaking for his three colleagues, Judge Newman stated:

> Putting the Government to the unattractive choice of suffering the admission into evidence of

> uncross-examined hearsay that it believes is false or else obtaining the opportunity to cross-examine by conferring use immunity not only ignores the settled law in this Circuit and elsewhere on prior statements of witnesses who invoke the privilege against self-incrimination, but also undermines our consistent rulings refusing to impose on the Government an obligation to confer use immunity on defense witnesses.

Pet. App. 58a-59a. Judge Newman further noted that, despite the panel's disclaimer that it was not deciding any issues arising under hearsay exceptions other than the one created by Rule 804(b)(1), "the Government is entitled to be apprehensive that a ruling that a witness is 'available' to the prosecution because use immunity can be conferred might in the future be applied to determine 'availability' beyond Rule 804(b)(1)." Pet. App. 60a.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 804(b)(1) provides that former testimony is admissible under that Rule if the party against whom it is offered had an "opportunity and similar motive" to develop the testimony in the prior proceeding. The district court in this case found that the government lacked such a motive. Far from disturbing that finding, the court of appeals agreed that, at the time the grand jury testimony at issue in this case was given, the government may have had no motive to impeach it. Accordingly, the testimony at issue failed to meet one of the express requirements of Rule 804(b)(1), and the court of appeals should have affirmed the district court's ruling that it was inadmissible under that Rule.

The court of appeals found the prior testimony admissible under Rule 804(b)(1) by holding that, when the declarant has invoked his Fifth Amendment privilege at trial, the requirement of similar motive is "irrelevant." In thus discarding an express requirement of Rule 804(b)(1), the court of appeals misunderstood the binding nature of the Federal Rules of Evidence. Congress enacted those rules into law and provided that they apply to civil and criminal proceedings in federal courts. Although a court may interpret ambiguous provisions of the Rules of Evidence, it may not simply ignore specific and unambiguous requirements of the Rules.

The court of appeals' rationale for holding the "similar motive" requirement to be "irrelevant" in the circumstances of this case does not withstand analysis. The court concluded that the declarants' grand jury testimony was admissible because the declarants were "available" to the government as witnesses at trial. The court reached that conclusion because the government had the power to immunize the declarants and thereby compel their testimony.

That reasoning is flawed in several respects. First, a witness who asserts his Fifth Amendment privilege and declines to testify is "unavailable" as a witness within the meaning of Rule 804. The definition of "unavailability as a witness" in Rule 804(a) extends to any witness who asserts a valid privilege. To hold that witnesses who invoke their Fifth Amendment privilege are nonetheless "available" to the government would alter settled understandings concerning each of the Rule 804(b) hearsay exceptions, since evidence is admissible under each of them only when the declarant is "unavailable as a witness." Second,

the conclusion that a witness is "available" to the opponent of proffered evidence does not in any event make the evidence admissible under Rule 804(b)(1) or any other exception to the hearsay rule. Finally, the court of appeals' ruling intrudes on the Executive Branch's exclusive power to immunize witnesses by unjustifiably requiring the government to choose between admitting untested and unimpeached prior testimony or granting immunity to a criminal defendant's associates and allies, thereby potentially impeding their subsequent prosecution.

ARGUMENT

GRAND JURY TESTIMONY MAY NOT BE ADMITTED AGAINST THE GOVERNMENT UNDER THE "FORMER TESTIMONY" EXCEPTION TO THE HEARSAY RULE IF THE GOVERNMENT LACKED A MOTIVE TO CROSS-EXAMINE THE DECLARANT BEFORE THE GRAND JURY

Rule 804(b)(1) provides that former testimony from an unavailable witness may be admitted over a hearsay objection if it satisfies several requirements: The declarant must be "unavailable as a witness"; he must have testified "as a witness at another hearing"; and the party against whom the testimony is offered must have "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). The rule embodies the judgment that testimony satisfying those specific requirements will be sufficiently reliable to present to a jury in the witness's absence. See *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980).

We do not dispute that Bruno and DeMatteis testified "as witnesses," that their testimony before the grand jury constituted "testimony at another hearing," and that the United States—the "party against whom the testimony [was] offered"—had the "opportunity * * * to develop [their] testimony by direct, cross, or redirect examination" in the grand jury. We do, however, contend that they were "unavailable" as witnesses at trial and that the government did not have a "similar motive to develop the testimony" when it was given before the grand jury.

A. The Government Did Not Have A "Similar Motive" To Develop The Grand Jury Testimony Before The Grand Jury.

For several reasons, the government typically does not have the same motive to cross-examine hostile witnesses in the grand jury that it has to cross-examine them at trial. That is particularly true in a case such as this one, involving a lengthy and complex grand jury investigation in which the prosecutor must exercise special care to protect the integrity and confidentiality of the investigation.

First, the government's examination of witnesses before a grand jury is affected by the need to maintain the security of the grand jury proceeding, a motive entirely distinct from any motive that the government ordinarily has at trial. This Court has recognized that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Butterworth* v. *Smith*, 494 U.S. 624, 630 (1990) (quoting *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)). To confront a witness suspected of perjury in the grand jury with all of the evidence against him threatens to expose

the status of the investigation at the time of the testimony, including the identities of informants, the scope of physical and electronic surveillance in connection with the investigation, and the nature of other investigative techniques being employed.

In particular, confronting the witness may reveal information gleaned from other grand jury witnesses who may have agreed to testify in spite of fears of reprisal. If the government exposes the extent of its knowledge to an individual who, by his willingness to commit perjury, has shown himself to be allied with the investigation's targets, the effect may be to provide information to the targets that can be used to threaten witnesses, destroy evidence, fabricate a defense, or otherwise obstruct the investigation. The government may thus have the least motive to challenge testimony of a grand jury witness in cases in which the government is most certain that the witness has perjured himself. For example, where the prosecutor knows that the grand jury will have the opportunity to hear or see tapes that directly contradict a witness's testimony, the prosecutor would have little to gain by confronting the witness with those tapes to demonstrate the perjury and much to lose by exposing the use of electronic surveillance to the targets of the investigation.[3]

Second, in the grand jury setting the government ordinarily has little incentive to discredit a perju-

[3] The government's normal concern for protecting the secrecy of a grand jury investigation was particularly acute here, given that the attorney who had a longstanding relationship with defendant Vincent DiNapoli—a member of the Genovese Family—and who later served as DiNapoli's counsel in this trial, had met with Bruno and provided him with legal advice relating to this case prior to Bruno's appearance before the grand jury. Mar. 12, 1987, Tr. 4-20.

rious witness with a vigorous, on-the-spot examination. By simply excusing the witness and continuing the grand jury's investigation, the government retains the options of prosecuting the witness for perjury, or recalling the witness for further examination when the investigation produces more evidence with which to confront him.

Third, the issues before the grand jury at the time a witness has testified will not necessarily be the same as those presented during the trial on an indictment handed down by that grand jury.[4] The grand jury does not conduct an "adversary hearing in which the guilt or innocence of the accused is adjudicated." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Its function "is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *United States* v. *R.*

[4] Respondents' suggestion (Br. in Opp. 13.) that " 'similar motive' is irrelevant, provided the issues in the former proceeding and the present one are substantially identical" was expressly rejected by the Advisory Committee when it drafted Rule 804(b)(1). Cross-examination or similar ability to develop the prior testimony is the key factor rendering such testimony admissible. Therefore, where there has been no such development—as was the case here—"[t]he opportunity must have been such as to render * * * the decision not to cross-examine meaningful in the light of the circumstances which prevail when the former testimony is offered." E. Cleary, *McCormick on Evidence* § 255, at 761-762 (3d ed. 1984). The Advisory Committee specifically determined that those "circumstances" went beyond the mere identity of the issues in the prior proceeding: "Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness expressing the matter in the latter terms is preferable." Notes of Advisory Committee on 1972 Proposed Rules, 28 U.S.C. at 789.

Enterprises, Inc., 111 S. Ct. 722, 726 (1991). Thus, while the ultimate issue before the grand jury is whether there is probable cause to believe that a crime has been committed, the scope and nature of the crime and the identities of the potential participants may well not have crystallized at the time a particular witness testifies before the grand jury.[5]

On the basis of these considerations, the district court held that "the motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial." Pet. App. 51a. In addition, with respect to the government's motives in this case, the district court found that the materials placed under seal "seriously undercut the truthfulness of the grand jury testimony and explain why the prosecutor did not pursue the witnesses, by way of cross-examination, in the grand jury." *Ibid.* Accordingly, the district court correctly held the evidence inadmissible under Rule 804(b)(1).

[5] We do not suggest that grand jury testimony will never be admissible against the government under Rule 804(b)(1). The factors that demonstrate the government's lack of motive to develop the grand jury testimony in this case will, however, be generally applicable and will lead to the same conclusion of lack of motive in other cases in which a defendant seeks the admission of grand jury testimony against the government under Rule 804(b)(1). Accordingly, as one recent commentary has suggested, absent "a special showing that the government conducted a full grand jury interrogation," grand jury testimony should not be admissible against the government under Rule 804(b)(1). 2 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 410 (5th ed. 1990). Cf. *Commonwealth* v. *Martinez*, 425 N.E.2d 300, 304-305 (Mass. 1981) (interpreting identical language of Massachusetts Rules of Evidence). In appropriate circumstances, however, grand jury testimony may be admissible under the residual hearsay exception, Fed. R. Evid. 804(b)(5).

The court of appeals did not overturn the district court's finding that the government lacked a similar motive to cross-examine the witnesses before the grand jury. Instead, the court of appeals "agree[d]" with the district court "that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis." Pet. App. 19a. Having reached that conclusion, the court should have applied the plain language of Rule 804(b)(1) and affirmed the district court's ruling that the grand jury testimony of Bruno and DeMatteis was inadmissible under that Rule.

B. The "Similar Motive" Requirement Of Rule 804(b)(1) Is "Relevant" Whenever A Criminal Defendant Seeks To Introduce Grand Jury Testimony Under That Rule.

The court of appeals held that the similar motive requirement of Rule 804(b)(1) is "irrelevant," Pet. App. 21a, 24a, or "evaporates," Pet. App. 21a, in circumstances such as those in this case. The court therefore held that the prior testimony was admissible and that its exclusion was reversible error. That holding reflects a fundamental misapprehension of the legal status of the Federal Rules of Evidence.

Although Congress debated the wisdom of codifying evidentiary rules, it settled that debate in 1975 by enacting the Federal Rules of Evidence—including Rule 804(b)(1) in substantially its present form. Pub. L. No. 93-595, 88 Stat. 1926.[6] See generally 4

[6] Unlike the Federal Rules of Civil and Criminal Procedure, which originally went into effect a specified period of time after their transmission to Congress, the Federal Rules of Evidence were enacted by Congress. See 28 U.S.C. 723b, 723c (1934) (governing promulgation of Federal Rules of

J. Bailey III & O. Trelles II, *Federal Rules of Evidence: Legislative Histories and Related Documents* (1980). Rule 101 of the Federal Rules of Evidence provides that "[t]hese rules govern proceedings in the courts of the United States * * *, to the extent and with the exceptions stated in Rule 1101." 88 Stat. 1929. Accordingly, the Rules of Evidence apply to criminal proceedings in federal district courts, and the particular terms of the Rules are binding on federal courts in considering evidentiary questions. Cf. *Palermo* v. *United States*, 360 U.S. 343, 353-354 n.11 (1959). That should be "the end of the matter." *Bourjaily* v. *United States*, 483 U.S. 171, 178 (1987).

To be sure, federal courts have substantial authority to determine how the specific provisions of the Rules apply to specific cases. That includes authority to make necessary factual determinations required by the Rules, as the district court did in this case when it determined that the government did not have a "similar motive" to develop the testimony of Bruno and DeMatteis before the grand jury. It also includes authority to interpret ambiguous provisions of the Rules in particular cases. It does not, however, include authority to refuse to apply provisions of the Rules simply because the court is unhappy with the

---

Civil Procedure), 18 U.S.C. 687, 689 (1940) (governing promulgation of Federal Rules of Criminal Procedure); Pub. L. No. 93-12, 87 Stat. 9 (providing that proposed Rules of Evidence "shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress"); Pub. L. No. 93-595, 88 Stat. 1926 (enacting Federal Rules of Evidence). The promulgation of federal rules of civil and criminal procedure and rules of evidence is currently governed by 28 U.S.C. 2071-2074.

result to which a particular application would lead. "Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner* v. *Asphalt Products Co.*, 482 U.S. 117, 121 (1987) (per curiam); see also *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). As this Court has remarked of Rule 52(a) of the Federal Rules of Criminal Procedure, Rule 804(b)(1) "is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988).

The untoward consequences of permitting a court simply to disregard controlling provisions of the Federal Rules of Evidence are illustrated by this case. Respondents attempted to introduce the grand jury testimony of Bruno and DeMatteis not only under Rule 804(b)(1), but also under Rule 804(b)(5), the residual exception for hearsay statements in which the declarant is unavailable as a witness at trial. The trial court specifically found that the testimony lacked the "circumstantial guarantee of trustworthiness" required by Rule 804(b)(5), see Pet. App. 51a, a finding that was not disturbed by the court of appeals.[7] See also Pet. App. 52a ("there is

---

[7] Most cases addressing the admissibility of grand jury testimony at trial when the declarant is unavailable have measured the proffered testimony against the more flexible standard of Rule 804(b)(5), rather than against the specific requirements of Rule 804(b)(1). Compare *United States*

no adequate guarantee of reliability of the grand jury testimony to justify its placement before this jury"). The result of the court of appeals' decision is thus that respondents' convictions must be reversed because the district court excluded former testimony that the government had no motive to develop when it was given and that was otherwise lacking in any circumstantial guarantee of trustworthiness. That result flies in the face of the central assumption underlying the hearsay rule: that hearsay evidence is presumptively inadmissible unless given in circumstances that attest to its reliability, either as provided for in the specific hearsay exceptions or as found by a trial court under the residual hearsay exceptions. See Notes of Advisory Committee on 1972 Proposed Rules, 28 U.S.C. at 771.

In departing from the requirements of the Rule, the court of appeals provided no limiting principle. Indeed, the court appeared to regard itself as free to dispense with not only the "similar motive" requirement of Rule 804(b)(1), but the "opportunity" requirement as well. Thus, the court stated that the testimony of Bruno and DeMatteis "was former

---

v. *Panzardi-Lespier*, 918 F.2d 313, 316-317 (1st Cir. 1990) (holding evidence admissible); *United States* v. *Snyder*, 872 F.2d 1351 1354-1355 (7th Cir. 1989) (same); *United States* v. *Curro*, 847 F.2d 325, 327 (6th Cir.) (same), cert. denied, 488 U.S. 843 (1988); *United States* v. *Carlson*, 547 F.2d 1346, 1353-1355 (8th Cir. 1976) (same), cert. denied, 431 U.S. 914 (1977); *United States* v. *Murphy*, 696 F.2d 282, 286 (4th Cir. 1982) (same), cert. denied, 461 U.S. 945 (1983), with *United States* v. *Fernandez*, 892 F.2d 976, 980-984 (11th Cir. 1989) (holding testimony inadmissible under residual exception), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273-1274 (5th Cir. 1977) (same).

testimony given by a declarant unavailable to the defendants, and the *opportunity and similar motive* to develop the testimony in front of the grand jury is irrelevant, because the declarants were not similarly unavailable to the government at trial." Pet. App. 24a (emphasis added). If the opportunity and motive to develop the testimony in the prior proceeding are "irrelevant," it is difficult to see why the opponent's status as a party in the prior proceeding—clearly a requirement of Rule 804(b)(1)—should be essential to a ruling that the prior testimony is admissible.[8]

In short, the court of appeals' interpretation threatens to convert Rule 804(b)(1), which was enacted by Congress as a limited exception to the hearsay rule, into a general license for admitting, at the behest of a criminal defendant, former testimony given in any proceeding by any witness who asserts his Fifth Amendment privilege at trial. Moreover, because there is no place in the court of appeals' analysis for consideration of the reliability of the former testimony, the court of appeals' interpretation would require that the evidence be admitted even if there is substantial reason to believe that it is unreliable and nothing at all to support its credibility.

---

[8] The "party" requirement has uniformly been respected by the lower courts. See, *e.g.*, *United States* v. *North*, 910 F.2d 843, 906-907 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991); *United States* v. *McDonald*, 837 F.2d 1287, 1291-1293 (5th Cir. 1988); *United States* v. *Kapnison*, 743 F.2d 1450, 1458-1459 (10th Cir. 1984), cert. denied, 471 U.S. 1015 (1985).

C. The Court Of Appeals Erred In Holding That Bruno And DeMatteis Were "Available" To The Government When They Invoked Their Fifth Amendment Privilege At Trial

The court of appeals based its decision to dispense with the "similar motive" requirement of Rule 804(b)(1) on its determination that "[t]he 'similar motive' requirement * * * protects the party to whom the witness is 'unavailable' in order to accord that party some degree of adversarial fairness." Pet. App. 20a. In the court's view, Bruno and DeMatteis were "available" to the government through the use of its immunity powers. See Pet. App. 17a, 41a. The court concluded that, "[s]ince the witnesses were only unilaterally 'unavailable' and could have been subjected to cross-examination by the government," the court would not "countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government." Pet. App. 22a.[9]

Even if the court of appeals had authority to hold an express provision of the Federal Rules of Evidence "irrelevant," the court of appeals' decision to exercise that authority in this case would have been mistaken, for several reasons. First, the conclusion that Bruno and DeMatteis were "available" to the government was incorrect. Rule 804(a) makes clear that a witness who invokes the Fifth Amendment privilege against compulsory self-incrimination is "unavail-

[9] In a subsequent case, *United States* v. *Bahadar*, No. 91-1263 (Jan. 22, 1992), the Second Circuit explained that "the 'similar motive' requirement is bottomed on rule 804(b)(1)'s overall goal of preserving adversarial fairness," which "was neither needed nor intended in a situation where the government itself created the testimony in the first instance and where it, alone, could compel live testimony from the same witnesses at trial." Slip op. 1236.

able" for purposes of the Rule 804(b) hearsay exceptions. Second, even if Bruno and DeMatteis can be said to have been "available" to the government, their grand jury testimony would still be inadmissible, as neither Rule 804(b)(1) nor any other hearsay exception authorizes the admission of out-of-court testimony simply because the opponent of the evidence has it within its power to force the declarant to testify. Finally, requiring the admission against the government of out-of-court statements by declarants who assert their Fifth Amendment privilege and whom the government declines to immunize, threatens improper judicial interference with the prosecution's decision whether to grant immunity to a witness.[10]

1. There is no legal basis for the court of appeals' conclusion that the declarants were available to the government for purposes of Rule 804. Rule 804(a)(1) defines "unavailability as a witness" to encompass cases in which a declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declar-

[10] While the court of appeals expressly declined to base its ruling on *Brady* v. *Maryland*, 373 U.S. 83 (1963), it suggested that the government's refusal to acquiesce in the admission of Bruno and DeMatteis's grand jury testimony might have violated its obligations under the *Brady* doctrine. Pet. App. 22a. That suggestion misreads the principles of *Brady* and its progeny. While *Brady* requires the government to alert defendants to potential sources of exculpatory evidence known only to the government, it does not make otherwise inadmissible evidence admissible. Cf. *United States* v. *Nobles*, 422 U.S. 225, 241 (1975) (Constitution does not give defendant right to present evidence free from legitimate demands of adversary system).

ant's statement." Neither that definition nor any other provisions of the Federal Rules of Evidence suggests that there is or ought to be any distinction between availability to the proponent of hearsay evidence and availability to the opponent. Nor would there be any basis for treating unavailability due to assertion of a Fifth Amendment privilege differently from unavailability due to other causes. As the court of appeals acknowledged, the Second Circuit itself has "long recognized that 'unavailability' includes within its scope those witnesses who are called to testify but refuse based on a valid assertion of their fifth amendment privilege against self-incrimination." Pet. App. 16a. Numerous other courts have similarly so held. See, *e.g.*, *United States* v. *Boyce*, 849 F.2d 833, 836 & n.2 (3d Cir. 1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1346 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Zurosky*, 614 F.2d 779, 792 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980); *Witham* v. *Mabry*, 596 F.2d 293, 297 (8th Cir. 1979); see also Notes of Advisory Committee on 1972 Proposed Rules, 28 U.S.C. at 788 ("Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony).").

To accept the court of appeals' conclusion that Bruno and DeMatteis were "available" to the government would upset the settled understanding of the concept of "availability" under all of the Rule 804(b) hearsay exceptions. For example, until the decision in this case, courts uniformly understood Rule 804(b)(3) to permit the government to introduce statements against penal interest upon a showing that the

declarant has been rendered "unavailable" by an invocation of the Fifth Amendment and that the other requirements of Rule 804(b)(3) have been met. See, *e.g.*, *United States* v. *Garcia*, 897 F.2d 1413, 1420-1421 (7th Cir. 1990); *United States* v. *Boyce*, 849 F.2d 833, 835-837 (3d Cir. 1988); *United States* v. *Briscoe*, 742 F.2d 842, 846-847 (5th Cir. 1984); see also *United States* v. *Williams*, 927 F.2d 95, 98-99 (2d Cir.), cert. denied, 112 S. Ct. 307 (1991); *United States* v. *Winley*, 638 F.2d 560, 562 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982). In none of those cases was the government's ability to make a declarant "available" through a grant of immunity found to have any impact on the admissibility of the evidence. Yet, under the Second Circuit's reasoning in this case, the government would be unable to introduce statements against interest under Rule 804(b)(3) if the government could make the declarant testify at trial by granting him immunity.[11]

It is no answer to state, as the court of appeals did in the November 6 amendment to its opinion, that it had not "considered * * * whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)." Pet. App. 41a. The court's suggestion that "unavailability" may mean one thing for Rule 804(b)(1) and another thing for the other Rule

[11] The court's reasoning would apparently require the same result in the case of the less frequently employed exceptions for statements made under belief of impending death (Fed. R. Evid. 804(b)(2)) and statements of personal or family history (Fed. R. Evid. 804(b)(4)). In addition, since the government's authority to immunize witnesses extends to civil cases, see 18 U.S.C. 6002, the court of appeals' reasoning would also apply in civil cases in which the government is a party.

804(b) exceptions simply demonstrates that the court of appeals regarded the concept of unavailability as a fluid one that could be molded differently for different factual settings. That concept, however, is squarely at odds with the plain terms of the Rule.

The term "unavailability as a witness" is defined once in the Federal Rules of Evidence, in Rule 804(a), and is used once in the Federal Rules of Evidence, in the sentence in Rule 804(b) stating the prerequisite for all the Rule 804(b) hearsay exceptions. There is no basis in the text of Rule 804, or in the reported decisions applying that Rule, to modify the definition of "unavailability" depending on which Rule 804(b) hearsay exception is at issue. In addition, although former testimony may be more reliable than some other forms of hearsay, what renders it reliable is either actual cross-examination or a meaningful opportunity to cross-examine. Absent either of those factors, the mere fact that the declarant was under oath in the prior proceeding and subject to a perjury prosecution is insufficient to justify relaxation of the hearsay rule. See *United States* v. *Feldman*, 761 F.2d 380, 385 (7th Cir. 1985) ("Mere 'naked opportunity' to cross-examine is not enough; there must also be a perceived 'real need or incentive to thoroughly cross-examine' at the time of the [prior testimony]."") (quoting *United States* v. *Franklin*, 235 F. Supp. 338, 341 (D.D.C. 1964)); *United States* v. *Pizarro*, 717 F.2d 336, 349 (7th Cir. 1983); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1251-1252 (E.D. Pa. 1980), modified, 723 F.2d 238 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986). See also *United States* v. *Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Snyder*, 872 F.2d 1351, 1355-1357 (7th Cir. 1989) (applying Rule 804(b)(5)).

In short, the court of appeals' holding that Bruno and DeMatteis were "available" to the government, notwithstanding their invocation of the Fifth Amendment privilege, has no support in the text or rationale of Rule 804.

2. Even if Bruno and DeMatteis could be said to be "available" to the government because of the government's power to immunize them and compel their testimony, that would not justify admitting their grand jury testimony at trial. There is no general hearsay exception applicable to out-of-court statements by declarants who are "available" to one of the parties. In particular, Rule 804(b)(1) has no special provision authorizing the admission of prior testimony of declarants who are "available" to the opponent of the testimony. If the other requirements of the Rule—including the "similar opportunity and motive" requirement—are not satisfied, the evidence is inadmissible regardless of whether the declarant can be made "available" by one of the parties.

Prior to this case, when defendants have sought to introduce prior testimony under Rule 804(b)(1) by a declarant rendered "unavailable" by his assertion of the Fifth Amendment privilege and given during proceedings at which the government lacked a sufficient motive to probe the declarant's statements, courts have consistently barred admission of the prior testimony under that rule. See, *e.g.*, *United States* v. *Powell*, 894 F.2d 895, 901 (7th Cir.) (upholding trial court's refusal to permit defendant to introduce his co-defendant's guilty plea allocution, reasoning that

the government lacks "the same motive [to examine the declarant] at a plea hearing as it does at other proceedings"), cert. denied, 110 S. Ct. 2189 (1990); *United States* v. *Serna*, 799 F.2d 842, 849 (2d Cir. 1986) (testimony of severed co-defendant in prior trial properly excluded because government lacked "an opportunity and similar motive to cross-examine the witness at the previous trial"); cert. denied, 481 U.S. 1013 (1987); *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (same); *United States* v. *Atkins*, 618 F.2d 366, 373 (5th Cir. 1980) (affirming trial court's ruling that defendant could not introduce a co-defendant's testimony at pretrial hearing because the government lacked motive to cross-examine co-defendant at that hearing on relevant issue); see also *United States* v. *North*, 910 F.2d 843, 906-908 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991). Those courts have correctly applied the Rules of Evidence, which make no provision for the admission of prior testimony against the government simply because the government has the power to force the declarant to testify at trial.

3. Finally, to hold that declarants who invoke their Fifth Amendment privilege at trial are "available" to the government, and that their prior testimony should therefore be admissible, would introduce into the application of the Rule 804(b) hearsay exceptions an improper bias in favor of criminal defendants and other parties litigating against the government. The government's power to immunize—a special power entrusted by statute to the Executive "to secure relevant testimony," *Earl* v. *United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967)—would be converted into a peculiar handicap, authorizing the admission of evi-

dence that would not be admissible on behalf of the government or a private party in a private civil suit. The Executive Branch should not be forced to grant immunity to a defendant's confederates as the price of having the rules of evidence applied according to their terms. See *United States* v. *Georgia Waste Systems, Inc.*, 731 F.2d 1580, 1582 (11th Cir. 1984); *United States* v. *Weiner*, 578 F.2d 757, 771 & n.12 (9th Cir. 1978); *United States* v. *Lang*, 589 F.2d 92, 95-97 (2d Cir. 1978).[12]

As Judge Newman noted in his dissent from the denial of rehearing en banc in this case, "[p]utting the Government to the unattractive choice of suffering the admission into evidence of uncross-examined hearsay that it believes is false or else obtaining the opportunity to cross-examine by conferring use im-

---

[12] The Second Circuit's creation of an immunity exception to the definition of "unavailability" is also inconsistent with well-settled law that, when a potential witness has asserted his Fifth Amendment privilege, the defendant is not entitled to a "missing witness" instruction licensing the inference that the potential witness's testimony would be adverse to the government. That rule is based on the premise that a potential witness who has asserted his Fifth Amendment privilege is equally unavailable to both parties, regardless of the fact that the government has the power to grant him immunity and thus to make him "available." See *United States* v. *St. Michael's Credit Union*, 880 F.2d 579, 597-599 (1st Cir. 1989); *United States* v. *Brutzman*, 731 F.2d 1449, 1453-1454 (9th Cir. 1984); *United States* v. *Flomenhoft*, 714 F.2d 708, 713-714 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *United States* v. *Simmons*, 663 F.2d 107, 108 (D.C. Cir. 1979); *United States* v. *Stulga*, 584 F.2d 142, 145-146 (6th Cir. 1978); *United States* v. *Chapman*, 435 F.2d 1245, 1247-1248 (5th Cir. 1970), cert. denied, 402 U.S. 912 (1971). See generally *Graves* v. *United States*, 150 U.S. 118, 121 (1893); L. Sand, *et al.*, *Modern Federal Jury Instructions* ¶ 6.04, at 6-16, 6-20 (1991).

munity * * * undermines [the Second Circuit's] consistent rulings refusing to impose on the Government an obligation to confer use immunity on defense witnesses." Pet. App. 58a-59a (citing *United States* v. *Pinto*, 850 F.2d 927, 935 (2d Cir.), cert. denied, 488 U.S. 867 (1988); *United States* v. *Turkish*, 623 F.2d 769, 772-774 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981)). Those rulings are, of course, not limited to the Second Circuit. See, *e.g.*, *United States* v. *Mitchell*, 886 F.2d 667, 669-670 (4th Cir. 1989); *United States* v. *Doddington*, 822 F.2d 818, 821 & n.1 (8th Cir. 1987); *United States* v. *Williams*, 809 F.2d 1072, 1083 (5th Cir.), cert. denied, 484 U.S. 896 (1987); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987). And the Second Circuit itself has cogently summarized the rationale for such judicial restraint:

> In addition to ensuring that prosecutorial decisions concerning whom to prosecute and what evidence to present at a criminal trial will not be lightly interfered with by the judiciary, it reduces the possibility of cooperative perjury between the defendant and his witness. A person suspected of crime should not be empowered to give his confederates an immunity bath.

Blissett v. *LeFevre*, 924 F.2d 434, 441-442 (internal quotation marks omitted), cert. denied, 112 S. Ct. 158 (1991).

Even when the government has found it necessary to immunize witnesses in the grand jury—as it did here—it should not be forced to permit defendants who may have conspired with those witnesses to engineer a broader grant of immunity at trial that would erect a substantial roadblock in the way of any

effort to prosecute those witnesses for their grand jury perjury or for any other crimes disclosed by their trial testimony. In the grand jury, the government can carefully limit its questioning to matters critical to its investigation; it can terminate the questioning at any point; and it can protect the secrecy of the proceedings. The government can thereby limit both the scope of a grant of immunity for grand jury testimony and the burden the government would have to carry to show that any subsequent prosecution was not "tainted" by the immunized evidence. See, *e.g.*, *Kastigar* v. *United States*, 406 U.S. 441 (1972). At trial, however, the examination and cross-examination of immunized witnesses is not subject to similar control and may result in an effective "immunity bath" for witnesses who could otherwise face separate prosecutions. In suggesting that "the government *made* Bruno and DeMatteis unavailable to the defense by refusing to immunize them at trial," Pet. App. 23a (emphasis added), the court of appeals ignored those considerations, as well as the fact that it was the witnesses' own fear of prosecution—quite possibly for perjury before the grand jury—that rendered them "unavailable." See *United States* v. *Chagra*, 669 F.2d 241, 260 (5th Cir. 1982) ("the government's refusal to remove an obstacle in the defendant's path simply cannot be equated with the government's placement of a barrier in the defendant's way").

* * * * *

In sum, the court of appeals ignored the requirements of Rule 804 in two critical respects. First, it refused to apply the express requirement of the Rule that the opponent of the proffered evidence must have had a "similar motive and opportunity" to cross-

examine at the time the former testimony was given. Second, it refused to apply the Rule's definition of "unavailability" according to its terms. Together, those two legal errors led the court to require the admission of evidence that was not given from the stand at trial, had not been tested by cross-examination, and was specifically found by the district court to lack circumstantial guarantees of trustworthiness. The court of appeals' ruling therefore not only violated the Rules of Evidence, but also disserved the very notions of fairness that the court invoked to support its novel ruling.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DANIEL C. RICHMAN
Attorney

MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45346

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward J. Halloran, Aniello Migliore, and Alvin O. Chattin were parties in the court of appeals. The petitioner has not sought review as to Auletta.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS[1]

The Central Theme of the Government's Case

The central theme of this megatrial was alleged bid-rigging and kickbacks on major concrete superstructure jobs at New York building construction sites. After a fourteen-month trial, the jury deliberated over several days before reaching verdicts acquitting on some counts and convicting on most. A separate verdict ordered RICO forfeitures. The facts are summarized in *Salerno II*, at 799-803; *see also* the tabular summary of verdicts, at 814-815.

The government alleged that some defendants, principally Salerno and Vincent DiNapoli, created a club of contractors who rigged bids on ready-mix concrete superstructure jobs, and paid a percentage on each job to the defendants. The key factual issues at trial were: The existence of the "club", the identities of any companies that were members of it, whether complimentary bidding had taken place, whether Vincent

---

[1] Relevant factual information and discussion is found in the following cases: an earlier case involving some of the same defendants and some similar allegations, *United States v. Salerno*, 868 F.2d 524 (2d Cir. 1989)["*Salerno I*"], relied on by the court of appeals for its factual discussion; an earlier appeal in this case, *United States v. Ianiello*, 866 F.2d 540 (2d Cir. 1989)["*Ianiello*"], in which the court of appeals remanded for a hearing on *ex parte* judicial and prosecutorial interference with the jury deliberations; the court of appeals opinion under review, *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991)["*Salerno II*"]; and a later opinion that further explains the basis of *Salerno II*, making clear that the issue the government seeks to have reviewed is not fairly presented by the opinion below, *United States v. Bahadar*, ___ F.2d ___ (2d Cir. 1992), 1992 WL 9390 ["*Bahadar*"].

DiNapoli and Salerno were involved in selecting successful bidders on concrete superstructure work, whether DiNapoli and Salerno had a hidden interest in Cedar Park Concrete, and whether concrete superstructure contractors paid the defendants a rake-off or "cut" on concrete superstructure contracts.

These issues were hotly disputed. The government had intercepted conversations that it claimed supported its theory; none of these interceptions captured the voice of respondent Vincent DiNapoli. The government offered, and the court admitted in evidence, statements by some contractors under Fed. R. Evid. 801(d)(2)(E) that "they had been informed . . . that Cedar Park was a member" of the "club."[2] A hearsay document of questionable authenticity purported to show that some defendants had an interest in Cedar Park Concrete.[3]

During the relevant time period, Cedar Park was owned in major part by Frederick DeMatteis, a successful New York builder and developer, as a subsidiary or affiliate of his parent company.[4] Pasquale Bruno was also a major investor in Cedar Park, and

---

[2] Brief for the United States ["USB"], at 4.

[3] The defense attacked the admissibility of this document: the authenticating handwriting "expert" had been rejected as an expert in prior judicial proceedings, was trained as an accountant, was not a member of the professional societies of questioned document examiners, and had based her opinion mainly on a photocopy of the questioned document. *See* Tr. 9872-98; *United States v. Wolfson*, 297 F. Supp. 881, 890 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 804 (2d Cir. 1969)(rejecting testimony of this witness).

[4] DeMatteis was also a principal in Metro Concrete for a period of time. *See Salerno I*, 868 F.2d at 542, and his own testimony.

was responsible for its day-to-day operation. Both of these men had first-hand knowledge of bidding practices on concrete superstructure work. Neither DeMatteis nor Bruno has ever been charged with any wrongdoing in connection with this case, including making any false statements.

Before trial, the government informed the defendants that Bruno and DeMatteis had testified before the grand jury under immunity and might have exculpatory information. *Salerno II*, at 804; *Bahadar*, at *26.[5]

The History of Indictments

The court of appeals noted that "there was an interesting relationship between [*Salerno I*] and the timing of the indictments in the case before us." *Salerno II*, at 800. The timing becomes critical when we review the dates on which DeMatteis and Bruno were called to the grand jury and given immunity at the government's specific request.

*March 13, 1986, the final (third superseding) indictment was returned in *Salerno I*.

*March 21, 1986, the first indictment in this case, *Salerno II*, was returned.

*June 3, 1986, Frederick DeMatteis was subpoenaed to the "April 1985 Special" grand jury (the same

---

[5] In *Salerno I*, 868 F.2d at 542, the government had told defense counsel of Bruno and DeMatteis, but defense counsel in that case did not subpoena Bruno, did not seek admission of the grand jury testimony, did not establish that either man would invoke a privilege against self-incrimination, and did not establish that DeMatteis's testimony related to the same issue on which the defendants in that case were being tried. In this case, the defense indisputably fulfilled all these predicates.

one before which he appeared on two later occasions and before which Bruno later appeared), was given immunity and began his testimony.

*June 12, 1986, DeMatteis returned to the grand jury at the government's insistence, with additional documents.

*June 19, 1986, DeMatteis was again called to the grand jury and interrogated. The three appearances total 280 transcript pages.

*September 8, 1986, the *Salerno I* trial began.

*September 11, 1986, Mr. Bruno appeared before the grand jury, was given immunity, and testified for most of a day.

*September 18, 1986, the first superseding indictment in *Salerno II*, was returned.

The jury verdict in *Salerno I* was January 13, 1987. Two days later, the second superseding indictment was returned in *Salerno II*. Trial in *Salerno II* was held on a third superseding indictment, returned April 7, 1987. In sum, by the time DeMatteis and Bruno appeared before the grand jury, the government and the public knew the identities of all relevant defendants, and the allegations against them.[6]

The government sought and obtained immunity for Bruno and DeMatteis, based on the statutory representations of United States Attorney Rudolph Giuliani, concurred in by an Assistant Attorney General,

[6] Some volumes of Bruno & DeMatteis testimony are captioned "United States v. Salerno, et al."

that their testimony "may be necessary to the public interest." DeMatteis, 6/3/86, p.27.[7]

The immunity grant for DeMatteis was read into the record on June 3, 1986, and gives him use immunity "before the grand jury . . . *and in any further proceedings resulting therefrom.*" DeMatteis, 6/3/86, p. 26[emphasis added]. The Bruno order does not appear in his transcript, but is presumably the same.

What DeMatteis and Bruno Said After The Government Gave Them Use Immunity Before the Grand Jury

On January 27, 1992, the court of appeals ordered:

> The government shall provide defendants' counsel with copies of the Grand Jury testimony of Frederick DeMatteis and Pasquale Bruno for their use in preparing for and arguing the appeal in the Supreme Court. Further disposition of the copies shall be subject to a further order of the Supreme Court.

The transcripts show that the government not only had the motive and opportunity to cross-examine DeMatteis and Bruno, but that it availed itself of that opportunity with precision and in detail. Moreover, the transcripts show that during its effort to impeach DeMatteis and Bruno, the government used and disclosed to both men "the . . . scope of electronic surveillance" in the investigation. USB, at 12. Of course, given the procedural history of this case and *Salerno*

[7] Citations to the grand jury testimony of DeMatteis and Bruno are by name, the date of the appearance, and a page. The government's submission in opposition to admissibility was *in camera*, so we have no more precise identification of the testimony itself. The testimony is in sealed envelopes in the record.

I, recounted above, everybody was aware of "the status of the investigation," USB, at 12, and of the identities of at least many persons who were going to be witnesses and declarants in *Salerno I*.

DeMatteis's grand jury testimony reveals that he is and has for many years been a well-respected general contractor in the City of New York, and that his company has at various times owned concrete superstructure firms and ready-mix supply firms as subsidiaries or affiliates. Mr. DeMatteis testified that he came into his father's construction business in 1945 when he got out of the Air Force and has been in it ever since:[8] "We went from a small construction firm in Brooklyn to one of the major construction firms in New York City and the metropolitan area. We were general contractors for a long period of time and then turned developers as well as general contractors." DeMatteis told the grand jury, under government questioning, that he and his companies had, between 1980 to 1985, controlling interests in Big Apple Concrete Company, Cedar Park Concrete Corporation, and Metro Concrete Corporation, as well as other entities involved in this case.

DeMatteis's grand jury subpoena called for corporate and individual records. He complied. In addition, during his testimony he was directed by the Grand Jury on no fewer than ten occasions to bring myriad other records related specifically to the matters at issue in this case.[9] From this cache of material, the

---

[8] DeMatteis, 6/3/86, p. 29.

[9] DeMatteis, 6/3/86, pp. 35-36, 38, 81, 93, 108; 6/12/86, p.77; 6/19/86, pp. 49, 58, 73.

government developed additional questions for his later appearances.

The AUSA repeatedly asked DeMatteis about the alleged role of organized crime figures in the construction industry, and in projects on which his company was a contractor. He repeatedly denied that any organized crime figures were involved in any way in his businesses.

Indeed, Mr. DeMatteis said "I said I would tolerate no outside interference. Otherwise we don't have a company."[10] DeMatteis said that he declined to have non-construction people involved as investors in his concrete company, including a prominent political figure and a New York lawyer who had introduced him to Paul Castellano. He told both of these people that they could not be investors. As he put it, "I wanted it to be a clean company."[11]

After interrogating Mr. DeMatteis for 200 pages about matters relevant to the main themes of its case, the Assistant United States Attorney homed in on alleged bid-rigging and payoffs. By this time, the government had ordered DeMatteis to produce all relevant bid files. Some examples:

> Q Did anyone ever tell you directly or indirectly that you were not to bid on that job?
> A If someone ever told me that Mr. Hellerer, that would make me do it. No, nobody ever did.[12]

---

[10] DeMatteis, 6/12/86, p. 34.

[11] DeMatteis, 6/12/86, p. 52.

[12] DeMatteis, 6/19/86, pp. 32-33.

* * *

Q Did you ever become aware that Mr. Bruno [the manager of and co-investor with DeMatteis in Cedar Park] was paying two percent on each of your jobs to organized crime?
A No, sir.
Q You never discussed that with Mr. Bruno?
A No way. No, sir.
Q Did you ever become aware that on the Libya House job it was paid?
A No.
Q Museum Towers?
A No.
Q Did you ever discuss it with anyone else?
A No.
Q You never discussed that with anyone else?
A No way.
Q That Cedar Park had to pay two percent?
A No way, and I don't believe that they did.[13]

The government was clearly not satisfied with DeMatteis's answers. Indeed, it began the June 19, 1986 session by reminding DeMatteis that he could be prosecuted for any false statements he had made under 18 U.S.C. § 1623. It then offered him the "opportunity" to recant any such false statements under § 1623(d).[14] DeMatteis did not change his testimony.

The AUSA then sought to impeach him:

> Q [By Assistant United States Attorney Hellerer] Mr. DeMatteis, I am going to read you a small part of a conversation that was intercepted pursuant to court order on August 14, 1984. Do you know a man by the name of Ralph Scopo?

[13] DeMatteis, 6/19/86, pp. 37-38.

[14] DeMatteis, 6/19/86, pp. 4-5.

The AUSA confronted DeMatteis with a quotation from a portion of a court-ordered electronic interception on which one of the speakers was allegedly the "co-schemer"—to use the words of the indictment—Ralph Scopo. In the conversation, Scopo referred to what the government claims to have been payoffs.

Even after the government disclosed this electronic surveillance, DeMatteis denied ever having discussed kickbacks with Mr. Bruno. Indeed, he said he had never discussed such payments with anyone, and had never heard of such payments.[15]

The government asked DeMatteis whether he knew defendant Vincent DiNapoli—alleged leader of the bid-rigging "club"—and he denied ever having met him.[16]

Mr. Bruno's September 11, 1986 testimony, given under use immunity, consumes 73 pages. Bruno described the entities with which he was connected over time, and the formation of Cedar Park as in effect a subsidiary of the DeMatteis organization. After relevant background interrogation, the questioning turned directly to the allegations in this indictment.

Bruno denied ever having spoken with Vincent DiNapoli "directly or indirectly," and swore he had never paid money "directly or indirectly" to Mr.

[15] DeMatteis, 6/19/86, pp. 42-45. Of course, DeMatteis and Bruno were free to disclose to anyone what had happened before during their grand jury appearances. F. R. Crim. P. 6(e)(1), discussed in *Butterworth v. Smith*, 494 U.S. 624 (1990).

[16] DeMatteis, 6/19/86, p.81.

DiNapoli. Bruno also denied that Cedar Park ever paid any money directly or indirectly to Mr. DiNapoli.[17]

The government pressed on:

Q Isn't it true that Mr. DiNapoli had a hidden interest in Cedar Park?
A No.
Q You're sure?
A Yes.
Q How are you sure?
A I don't know of one. Let's put it that way.
Q Did you ever meet a gentleman by the name of Anthony Salerno?
A No.
Q Did you ever hear of him?
A In the newspapers.
Q Did you ever talk to him—did you ever talk to anybody in the business about him other than the newspapers?
A No.[18]

Bruno testified that his only knowledge of an alleged "club" of concrete contractors was that he had read testimony in which others had said such a club existed. Before that, he "never heard" of a club, unless it was mentioned in the newspapers. Bruno never heard about concrete contractors being obliged to pay two percent of their contract price and never discussed that with anybody.[19] The interrogation continued:

---

[17] Bruno, 9/11/86, p.43.

[18] Bruno, 9/11/86, pp. 43-44.

[19] Bruno, 9/11/86, pp.50-51.

Q Never paid any money to anybody?
A That is correct. No.
Q You're not aware that Cedar Park ever paid any money to anybody?
A That is correct, yes.
Q Isn't it true that Cedar Park paid two percent on the Libya House job?
A No.
Q That is not true?
A No.
Q Did you ever have any discussions about paying any money on the Libya House job?
A Never.
Q With no one?
A No one.
Q Inside or outside Cedar Park?
A Right.
Q Did you ever talk to Ralph Scopo about it?
A No.
Q Vincent DiNapoli?
A No.
Q Any representatives of either of those gentlemen?
A No one. No.
Q It might interest you to know, Mr. Bruno, that Mr. Scopo has been intercepted under electronic surveillance saying that in fact you did pay two percent on the Libya House job.
A I can't help that.
Q You're saying that that is not true?
A That is correct.[20]

---

[20] Bruno, 9/11/86, pp. 51-52.

Bruno also denied engaging in complimentary bidding[21] and ever being shaken down for money for a job.[22]

What the Second Circuit Held—And Did Not Hold

In the district court, Bruno and DeMatteis appeared and invoked the privilege against self-incrimination. The district judge denied defense motions even to see the grand jury testimony, and to admit it in evidence. She did so based in part on an *ex parte, in camera* submission from the government. On appeal, the court and government had access to the *ex parte* material and to the testimony, but neither the defendants nor their counsel did.

The Second Circuit, reversing the convictions, analyzed Federal Rule of Evidence 804 in light of its dominant purpose of preserving adversarial fairness. It held that it did not need to reach the question of "similar motive," because the government had already immunized these witnesses and was free to do so again. The witnesses were not unavailable to the government in this specific context.

The court of appeals also pointed to a number of instances in which the government and the trial judge had overridden the defendants' rights to a fair and impartial trial of these charges.[23] It cast doubt upon

---

[21] Bruno, 9/11/86, pp. 28-30.

[22] Bruno, 9/11/86, p.47.

[23] The government states that the court of appeals did not reverse defendant Auletta's conviction based on the error as to him. This is true, but incomplete. The court of appeals found it "not necessary" to reach the issue, but said it might recur at a retrial. [*Salerno II*, at 811] The court of appeals did not reach

the fairness of a remand hearing to inquire into judicial and prosecutorial interference with jury deliberations, but said it need not decide all the thorny issues presented by the record, saying "because such conduct would be so far beyond the bounds of permissible behavior by anyone connected with the courts, we do not expect that the issue will arise ever again." 937 F.2d at 813.

On rehearing, the court amended its decision to make clear that it was not considering the "availability" doctrine in any context other than Rule 804(b)(1). Four judges (Newman, Kearse, Mahoney and Walker) dissented from denial of rehearing en banc.

In an opinion, *United States v. Bahadar*, ___ F.2d (2d Cir. 1992), 1992 WL 9390, formally issued a day after certiorari was granted, the Second Circuit explained its holding in *Salerno II*. Judge Mahoney, who had been among the en banc dissenters, was on the panel and joined the opinion.

Judge Pratt began by acknowledging as he had in *Salerno II* that the grant of use immunity is predominantly an Executive Branch decision:

> As we have repeatedly held, the fifth amendment does not require "that defense witness immunity must be ordered whenever it seems fair to grant it." *United States v. Turkish*, 623 F.2d 769, 777 (2d Cir.1980), *cert. denied*, 449 U.S. 1077 (1981). We have recently reaffirmed the long-standing principle that "[i]mmunity remains 'pre-eminently a func-

---

many of the "sixteen" arguments raised by the eight appellants. [*Salerno II*, at 803] These points would be open for decision on remand if this Court reverses.

tion of the Executive Branch.' " 1992 WL 9390, at *19.

As Judge Pratt noted, *Salerno II* reaffirms that "the government is in no way required to grant use immunity to a witness called by the defense; it is simply left with a series of choices" *Bahadar*, at *21, *quoting Salerno II*, at 807-08.

In rejecting Bahadar's claim that a statement against penal interest was wrongly excluded from evidence, Judge Pratt discussed the "unavailability" holding of *Salerno II*. Because the discussion casts light on the true issue presented by this record and the judgment below, we quote at some length:

> [T]here has been some suggestion that *United States v. Salerno* might be read to support the proposition that "a witness is 'available' to the prosecution because use immunity can be conferred". *See United States v. Salerno* . . . (Newman, J., dissenting from denial of rehearing in banc). Thus, so the argument goes, the government would be unable to invoke any of the rule 804(b) hearsay exceptions in criminal cases . . . .
>
> Such an interpretation of *United States v. Salerno* would be an unrealistic reading of the rules of evidence, of the law of immunity, and of the *Salerno* decision itself. The discussion of rule 804(a)(1) in *Salerno* provided a background for our analysis of rule 804(b)(1), the former testimony exception, which was there in issue. Thus, on rehearing, the panel clearly limited its discussion of "availability" to the narrow circumstances presented under rule 804(b)(1). . . .

> Of all of the hearsay exceptions in Fed.R.Evid. 804, former testimony is a special case. It is "the strongest hearsay", see Fed.R.Evid. 804 advisory committee's note, because "[c]ross-examination, oath, the solemnity of the occasion, and in the case of transcribed testimony the accuracy of reproduction of the words spoken, all combine to give former testimony a high degree of credibility." . . . The other rule 804 hearsay exceptions (statement under belief of impending death, statement against interest, statement of personal or family history) lack these reliability enhancing factors.
>
> In *Salerno*, . . . [w]e rejected the government's "dissimilar motive" argument, discussing rule 804(a) merely as an introduction and aid to our construction of rule 804(b)(1). The government created the testimony of Bruno and DeMatteis in the first instance by granting them use immunity in front of the grand jury. But, when confronted with the possibility that the grand jury testimony might be admitted at trial, the government sought to rely on the "similar motive" requirement of rule 804(b)(1) as a shield to prevent admission of that testimony, even after it had identified Bruno and DeMatteis as "Brady witnesses". *See Brady v. Maryland*, 373 U.S. 83 (1963). Because the "similar motive" requirement is bottomed on rule 804(b)(1)'s overall goal of preserving adversarial fairness, we concluded in Salerno that it could not be invoked by the government. Preservation of adversarial fairness for the

government was neither needed nor intended in a situation where the government itself created the testimony in the first instance and where it, alone, could compel live testimony from the same witnesses at trial. We thus declined to allow the government to hide behind the protective "similar motive" shield that is written into rule 804(b)(1). . . .

Other circuits have rejected the government's efforts to use the protective provisions of rule 804(b)(1) in identical circumstances. . . .[24]

To summarize: our decision in *Salerno*, contrary to the fears of the in banc dissenters and the government, did not change the concept of "unavailability" as defined in Fed.R.Evid. 804(a)(1). When a fifth amendment privilege is properly asserted by a trial witness, that witness becomes "unavailable" for purposes of rendering potentially applicable all of the hearsay exceptions described in rule 804(b). . . . Each of those exceptions, of course, has its own special requirements for admissibility. 1992 WL 9390, at *25-29.

---

[24] *Citing United States v. Miller*, 904 F-2d 65, 68 (D.C. Cir. 1990) ("Before the grand jury and at trial, [the witness's] testimony was to be directed to the same issue—the guilt or innocence of [the grand jury targets]."); *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984); *United States v. Young Bros., Inc.*, 728 F.2d 682, 691 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984); *United States v. Klauber*, 611 F.2d 512, 516-17 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980). *Cf. United States v. Vigoa*, 656 F.Supp. 1499, 1505 (D.N.J. 1987), *aff'd mem.* 857 F.2d 1467 (3d Cir. 1988).

SUMMARY OF ARGUMENT

1. The government had a "similar motive" to its trial objective to develop Bruno's and DeMatteis's testimony before the grand jury. The grand jury was considering, and eventually returned, a superseding indictment involving the same defendants and issues as in the trial. The government interrogated Bruno and DeMatteis for hundreds of pages of transcript. It confronted them with assertedly contradictory wire taps of alleged principals in the unlawful scheme. The record—as distinct from the hypothetical arguments presented in the government's brief—shows that F.R.Evid. 804(b)(1) was amply satisfied. Furthermore, the drafters of Rule 804(b)(1) rejected the proposition that former testimony may be excluded because of a party's tactical decisions on the nature and extent of cross-examination at the earlier proceeding. Former testimony is the most reliable form of hearsay, for it is under oath and subject to cross-examination.

Had the former testimony been received in evidence, F.R.Evid. 806 would have permitted the government to deploy all its credibility-attacking weapons. Rule 806 was expressly designed to eliminate the hardships of which the government claims when former testimony is admitted. On this record, the former testimony would have included cross-examination.

2. "Similar motive", like any other evidentiary principle that ordinarily permits a party to block admissibility of relevant evidence, may not be relied on when doing so violates adversarial fairness. This is what the Second Circuit held, and the principle finds ample support in federal evidence law.

In trials, a party cannot tell half a truth and hide the rest. A party cannot open the door to a subject

and then bar the opponent from entering with evidence of its own. A party cannot rely on a rule of nonadmissibility, then present evidence that the otherwise inadmissible material would effectively contradict. This principle is central to the adversary process, and it has been applied over and over again by this Court and the lower federal courts. The principle of adversarial fairness often requires a court to admit evidence that would otherwise be barred by literal application of a rule of evidence.

In criminal cases, barring reliable exculpatory evidence offered by the defendant violates the due process and compulsory process clauses. This Court has applied this rule to hearsay evidence that did not even possess the safeguards of oath and cross-examination. The Second Circuit rightly held that if Rule 804(b)(1) were construed to bar the Bruno/DeMatteis former testimony, a serious constitutional issue would be presented for decision.

3. The government concedes that Bruno and DeMatteis were unavailable to the defense. The government had already once given them immunity, and at least the DeMatteis grant was facially broad enough to have permitted the government to cross-examine him at trial if it wished.

This Court has repeatedly held that, while the government may not be compelled to grant immunity to serve a private party's purpose, it must often choose between granting immunity and foregoing some important objective of its own, such as battling corruption.

Because the record of DeMatteis's and Bruno's actual grand jury appearances is so far from the hy-

pothetical and suppositious arguments raised by the government, the writ should be dismissed as improvidently granted. If not, the judgment below should be affirmed.

ARGUMENT

We have briefed the issues in the same order as did the United States. The government concedes, USB, at 11:

1. Bruno's and DeMatteis's testimony was given "at another hearing;"

2. they testified as "witnesses;"

3. the United States, against whom "the testimony is now offered," had "an opportunity" to "develop the testimony;" and

4. Bruno and DeMatteis were unavailable to the defense.

The government claims, however, that the witnesses were "unavailable" to it as well as to the defense. It denies that it had a "similar motive to develop the testimony" when it was given. USB, at 11.

A. The Government Had A "Similar Motive" To Develop The Grand Jury Testimony Before the Grand Jury.

The government's argument under this heading is long on generalities, but short on specifics. Since this is a concrete case in more ways than one, we begin with Justice Holmes's aphorism, "General propositions do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905)(dissenting opinion).

The government reminds us of grand jury secrecy. Yet the case it cites, *Butterworth v. Smith*, 494 U.S. 624 (1990), upholds the grand jury witness's right to disclose. Indeed, as *Butterworth* says, grand jury secrecy is not "a talisman that dissolves all constitutional protections," citing *United States v. Dionisio*, 410 U.S. 1, 11 (1973).

More importantly, not one of the reasons for grand jury secrecy listed in *Butterworth*, and the cases on which it relies, is present here. *See* 494 U.S. at 630; *see generally* C. Wright, *Federal Practice & Procedure*, Criminal 2d, § 106, at 243 (citing to cases). By the time DeMatteis and Bruno testified, all the key parties and issues had been broadcast by the government in two indictments, one of which had been the subject of pretrial proceedings and was headed for—or in—trial. DeMatteis and Bruno themselves were listed on dozens of public documents as principals in Cedar Park and other relevant entities.

The government's next generality—that confronting witnesses in the grand jury and impeaching them risks disclosure of important governmental information, USB 11-12,—is demonstrably irrelevant to this case. The government did confront and did disclose.[25] While

[25] This fact makes it hard to understand why the government would tell this Court, USB 12, that "the prosecutor would have little to gain by confronting the witness with those tapes." If this is meant to suggest that the tapes were *not* used, it is untrue. If it is meant to say that tapes are never used, it is irrelevant. The existence of electronic surveillance is routinely disclosed to targets under 18 U.S.C. § 2518(8)(d).

The government's attack on Mr. Newman, USB 12 n.3, is unworthy. Newman's sole role was to refer Bruno to other counsel.

it had the "option," USB 13, of calling DeMatteis and Bruno back to the grand jury, it never did so, and it is hard to think of a line of questioning it had not already pursued.

So far as prosecuting alleged grand jury perjury is concerned, USB 13, that rationale cuts in favor of admissibility. An immunized witness may escape punishment altogether for any past wrongs. *See, e.g., United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991). The only prospect of temporal punishment that tethers such a witness to the truth is of a prosecution for perjury, as provided in 18 U.S.C. § 6002. Yet, as Chief Justice Burger taught in *Bronston v. United States*, 409 U.S. 352 (1973), in order to prosecute a witness for perjury, the examiner must firmly tie him or her to the allegedly false story.

The government claims that "the issues before the grand jury at the time a witness has testified will not necessarily be the same as those presented during the trial." As an abstract matter, that assertion might be true, and courts—including the Second Circuit—have held former testimony inadmissible on that basis. *See, e.g., United States v. Serna*, 799 F.2d 842 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987)(former testimony of unavailable alleged coconspirator not admissible on defendant's motion—issues different).

In this case, the government itself "created" the testimony, *Bahadar*, at *27, when the issues were clear. The government's timing and conduct make the similar motive requirement irrelevant here, just as the court of appeals held.[26] The existence of the bid-rig-

[26] This Court can affirm the court of appeals' sensible result

ging conspiracy was an ultimate fact in the grand jury proceeding as well as at trial—if the grand jury credited Bruno and DeMatteis' testimony denying the existence of "the Club," then it presumably would not have handed down the superseding construction case indictments. In the concrete as opposed to the abstract, the government's motives in the grand jury and at trial were identical: to show that Bruno and DeMatteis were lying and that "the club" existed.

The admissibility of the Bruno/DeMatteis grand jury testimony under Rule 804(b)(1) thus presents an unexceptional application of a hoary evidentiary principle: where the issue at stake in the former proceeding's testimony was substantially the same as the issue for which the former testimony is offered at trial, and the party against whom it is offered had the opportunity to cross-examine the witness, the motives are "similar" and the hearsay comes in. 5 Wigmore, *Evidence* §§ 1386-1387 (Chadbourn rev. 1974); Cleary, *McCormick on Evidence* § 257, at 620-2 (3d ed. 1984).[27] This principle was incorporated and expanded when

on a ground not relied on by that court. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), including that the testimony is admissible under Rule 804(b)(5).

[27] In the course of analyzing the irrelevancy of the government's motive, the Court of Appeals noted its equivocal agreement that "the government *may* have had no motive before the grand jury to impeach" Bruno and DeMatteis. Pet. App. 19a (emphasis added). The court provided no reasons for its "agreement," however, and given the context of this statement—consideration of the purposes served by the "similar motive" requirement—it appears that the court was simply accepting the government's position *arguendo* for purposes of demonstrating the irrelevance of motive. *Id.* at 20a.

Congress enacted Rule 804(b)(1).[28] Notes of the Advisory Committee on 1972 Proposed Rules, 28 U.S.C.A. at 446-7; 4 Weinstein & Berger, *Weinstein's Evidence* 804(b)(1)[04], at 804- 85 - 804-88 (1991).

[28] The government's statement that the Advisory Committee rejected the "identity of issues" standard (the old common law test) in favor of the "opportunity" and "similar motive" requirements misconstrues the significance of this substitution. Gov. Br. 13 n.4 (*citing* Advisory Committee Notes). The Advisory Committee Notes make clear that Rule 804(b)(1) was drafted in terms of "similar motive" because the traditional "identity of issues" requirement was simply "a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity was presented," and this purpose was best served by making explicit the conditions under which this "equivalent handling" could be said to have occurred—i.e., where the party against whom the testimony was offered had the opportunity and a similar motive to develop the testimony. *Id.* ("identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness"); *see also* McCormick, *supra* 257. Thus, the Advisory Committee in no way "rejected" the "identity of issues" test in the sense of finding it misguided or premised on the wrong considerations. Quite the contrary: consistent with its overall intention to rationalize commonlaw hearsay doctrine and free it from artificial restrictions having no bearing on the reliability of declarations, the Committee sought to draft a rule that embodied the same values underlying the "identity of issues" standard while expanding its scope to serve these values in situations where the "identity of issues" test might not be met under its strict traditional interpretation. Accordingly, "identity of issues" remains a, perhaps *the*, critical factor in determining whether there was a similar motive under Rule 804(b)(1). Weinstein & Berger, *Weinstein's Evidence* 804(b)(1)[04], at 804-85 - 804-88 (1991); *see also, e.g., United States v. Wingate*, 520 F.2d 309, 316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976) (finding no similar motive because issues differed at prior proceeding).

The government wants Rule 804(b)(1) construed as presumptively excluding grand jury testimony. The Rule, its forerunners and the cases construing it all counsel against that position.[29] In one leading case, *United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990), the court of appeals reversed a conviction because the trial judge had failed to admit exculpatory grand jury testimony. Judge Silberman, joined by then-Judge Clarence Thomas, held that admissibility was "firmly rooted in our jurisprudence." Judge Silberman stated:

> [A]s several circuits have recognized, the government had the same motive and opportunity to question [the witness] when it brought him before the grand jury as it does at trial. . . . Before the grand jury and at trial, [the witness'] testimony was to be directed to the same issue—the guilt or innocence of [the defendants].

Miller, at 68 (citations and note omitted).[30]

The government's suppositious arguments about reasons for not doing an effective job in the grand jury misconceive the adversarial calculus of the hearsay exception at issue. The drafters of Rule 804(b)(1) specifically rejected the proposition that former testimony may be excluded on the basis of a party's tactical decisions about the extent or manner of cross-examination at the prior proceeding.

---

[29] *See*, in addition to cases cited in *Bahadar*, *United States v. Henry*, 448 F.Supp. 819 (D.N.J. 1978).

[30] In the D.C. Circuit, a witness who waives the Fifth Amendment in the grand jury will usually be deemed to have waived it for the subsequent trial as well. *See* 904 F.2d at 65.

> If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. . . . An even less appealing argument is presented when the failure to develop fully was the result of a deliberate choice.

Advisory Committee Notes to Proposed Rule 804.

Courts have not hesitated to hold defense counsel to their chosen cross-examination strategy at the prior proceeding, *see e.g. United States* v. *Zurosky*, 614 F.2d 779, 793 (1st Cir. 1979) ("Defense counsel made a tactical decision not to question Smith; this does not mean that they were denied an opportunity to do so"); *Glenn* v. *Dallman*, 635 F.2d 1183, 1187 (6th Cir. 1980) (habeas proceeding). The principle is equally applicable to the government's tactical cross-examination decisions. *United States* v. *Pizarro*, 717 F.2d 336, 349 (7th Cir. 1983) (reversing conviction based on failure to admit former testimony; a "self-imposed restriction" limiting the government's inquiry into certain subjects on cross-examination at prior trial "at best . . . represented the government's selection of a trial strategy unrelated to any factor relevant to its substantive position in the case"); *Odato* v. *Vargo*, 677 F.Supp. 384, 387 (W.D.Pa. 1988).

Indeed, in the related Confrontation Clause context, this Court has repeatedly held former testimony from a defendant's preliminary probable cause hearing admissible against the defendant at trial, although as a matter of defense tactics it is typically in the defendant's interest to use such a hearing for discovery purposes rather than for impeachment. *See*

Ohio v. *Roberts*, 448 U.S. 56 (1980); *California* v. *Green*, 399 U.S. 149 (1980). *See also Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (defendant entitled only to "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" under Confrontation Clause). Rule 804(b)(1), correctly interpreted, saves courts the trouble of second-guessing lawyers' decisions to cross-examine or not. The *opportunity* is all that is required.[31]

Here, the proffered differences in the government's impeachment tactics in the grand jury are particularly unpersuasive because these same impeachment methods are available to the government at trial. Fed. R. Evid. 806 permits a party to attack the credibility of a hearsay declarant "by any evidence which would be admissible for those purposes if declarant had testified as a witness." The Advisory Committee contemplated that Rule 806 would be applied in conjunction with Rule 804(b)(1), noting—in connection with its elimination of traditional foundation requirements for the

---

[31] Consider a typical multidefendant civil antitrust case. Plaintiff notices the deposition of an officer of Defendant A. Counsel for Defendants A, B, C and D show up and "defend" the deposition by interposing objections. Often, they ask no questions. They count on being able to call the witness at trial, so the deposition will be used only for impeachment. After all, millions of dollars may be at stake in the litigation, and asking questions would only give away the defense strategy. As every civil lawyer knows, this all works just fine until Defendant A settles and won't make the witness (who we will suppose lives outside the civil subpoena range) available, or the witness dies, or maybe the witness decides to invoke the privilege against self-incrimination. The deposition is going to be admitted. 4 *Weinstein's Evidence* ¶ 804(b)(1)[02].

use of impeachment material—that "the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment." Notes of Advisory Committee on Proposed Rules, 28 U.S.C.A. at 499; Weinstein & Berger, *supra*, 806[01], at 806-6 - 860-13; *Pizarro*, *supra*, 717 F.2d at 350 (reversing conviction based on exclusion of former testimony in part because government would have full opportunity to impeach declarant of former testimony under Rule 806). Indeed, one of the purposes served by the elimination of foundational requirements under Rule 806 is to provide the party against whom former testimony is admitted under Rule 804(b)(1) with the opportunity to rectify any defects or tactical omissions in the cross-examination at the prior proceeding. As Judge Weinstein points out, although the rationale for eliminating foundation requirements is weaker in the case of a party who had the requisite opportunity and motive to cross-examine at the prior proceeding (since such party is presumed to have had at the time the motive and opportunity to develop the required foundation), it is still the case that "there may be instances where cross-examination was deliberately limited because of other tactical considerations . . . [o]r the prior testimony may stem from a preliminary hearing where cross-examination is rare." Weinstein & Berger, *supra*, at 806-8.

Rule 806 thus anticipates and negates the government's contention that its tactical decisions regarding the form, manner and timing of its impeachment of grand jury witnesses takes it out of the scope of Rule 804(b)(1). To the extent that the government finds it more expedient to impeach an allegedly perjurious

witness in the grand jury by introducing contradictory evidence after the witness has left the stand, Rule 806 provides for the use of this same impeachment evidence at trial. Similarly, should the government choose to recall a grand jury witness "for further examination when the investigation produces more evidence with which to confront him," USB, at 13, either this same evidence or the transcript of the later testimony may be admissible for impeachment at trial under Rule 806.[32]

Finally, lurking behind the government's tactical view of the Rule 804(b)(1) "similar motive" requirement is an untenable and improper understanding of

---

[32] The government does not mention or address the availability of Rule 806. The District Court, however, did address and reject the defendants' Rule 806 arguments based on (1) its *ex parte* finding that the "truthfulness" of Bruno and DeMatteis' testimony was "seriously undercut" by the government; and (2) its belief that the use of the grand jury impeachment material at trial pursuant to Rule 806 would violate Fed. R. Crim.. P. 6, by requiring the disclosure of secret grand jury information. (Pet. App. 51a-52a). As we discuss further in the accompanying text *infra*, the District Court's first basis mistakenly substitutes its evaluation of the reliability of the hearsay declarants for the requirements of Rule 804(b)(1). *Pizarro*, *supra*, 717 F.2d at 350 (rejecting proposition that "the admissibility of previously cross-examined trial testimony turn[s] on a subsequent court's view of the unavailable declarant's reliability"). The District Court's second concern is misplaced in that much of the contradictory evidence presented to the grand jury, including surveillance tapes, will in most cases form part of the government's proof at trial and therefore be public apart from its use in the grand jury. Given the government's control of the grand jury minutes, and the terms of Rule 6, this concern is fanciful. The government cannot seriously be saying that it can't cross-examine because it doesn't want to give away its secrets.

its role in the grand jury proceeding. At trial, the District Court rejected the admissibility of the Bruno/DeMatteis testimony based in part on its *ex parte* finding that the government's sealed affidavit "seriously undercut the truthfulness" of the testimony. (Pet. App. 51a.) The government rightly makes no attempt to defend this basis for exclusion, because the reliability of the declaration is not a factor in determining its admissibility under the exceptions of Rule 804(b): rather, it is the circumstances defined by the enumerated exceptions themselves that provide the necessary guarantees of reliability. *Idaho* v. *Wright*, 110 S.Ct. 3139, 3147 (1990); *Ohio* v. *Roberts*, *supra*, 448 U.S. at 67 ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception").

Nevertheless, the government would surreptitiously re-introduce the issue of the declarant's reliability in a particularly insidious form, by making the admissibility of former grand jury testimony turn on the *government's* unilateral view of the witness' credibility. Under its analysis, if the government, in its sole judgment, believes the witness is lying, then the testimony must be excluded by the trial court because the government will not have had the required motive to cross-examine. Indeed, the government suggests that it may wish to forego cross-examination entirely in favor of prosecuting the witness for perjury, although the result would be that the grand jury is left with unimpeached testimony that directly contravenes the government's view of the case. USB, at 13. Intrinsic to this reasoning is the proposition that the government's impetus to cross-examine a witness turns on *its own* evaluation of the witness' credibility,

and not on any concern about what *the grand jury's* evaluation of the witness might be.

B. "Similar Motive", Like Any Other Evidentiary Principle That Ordinarily Permits A Party To Block Admissibility Of Relevant Evidence, May Not Be Relied On When Doing So Violates Adversarial Fairness.

1. Former Testimony Is Such Reliable Hearsay That Limitations On Its Use Are Strictly Construed.

Rule 804(b)(1) codifies a venerable rule. Wigmore thought it "a class of evidence where the requirements of the hearsay rule are complied with," hence not requiring an exception. Dean McCormick followed the majority view that it is simply a very reliable form of hearsay. C. McCormick, *Evidence* § 230 (1st ed. 1954), citing 5 Wigmore, *Evidence* 1370. *See generally Motes v. United States*, 178 U.S. 458, 471-73 (1900), cited with approval, *Pointer v. Texas*, 380U.S. 400, 407 (1965).

In addition to unavailability, with which we deal below, Rule 804(b)(1) requires that the former testimony possess every guarantee of trustworthiness required by the adversary system except presence in court. The oath, personal knowledge[33], and the opportunity for cross-examination, must all have been present. The justification for the former testimony exception, now as under pre-Rules caselaw, is necessity—among the most venerable of justifications for dispensing with *viva voce* testimony. Wigmore § 1364, at 23-24.

---

[33] All hearsay declarants must have personal knowledge. *See* Advisory Committee Notes to Federal Rules of Evidence 803, 804.

The government derides what it claims to be departures from the literal words of Rule 804(b)(1). Yet Dean McCormick long ago remarked that interpretation of statutes and rules on former testimony are often relaxed by courts to admit reliable hearsay:

> Many of the exceptions to the hearsay rule have been developed almost solely through the judicial process, others have been widely regulated by statute, and the present exception is of the latter class. It will be impossible, however, in this brief work to describe the variations in the statutes of the different states. The usual approach, however, is that these statutes on former testimony are "declaratory" of the common law, so far as they go, and not the exclusive test of admissibility. Accordingly, if the evidence meets the common law requirements, it will usually come in even though the permissive provisions of the statute do not mention the particular common law doctrine which the evidence satisfies.

McCormick, *Evidence* § 230, at 481 (1st ed. 1954).

McCormick's view is borne out in practice. For example, the Rule does not in terms require that the former testimony have been under oath. Such a requirement is explicit in, for example, Rule 801(d)(1)(A). Yet, the government assumes, we concede, the Advisory Committee notes state, and the common law rule was and is, that the former testimony must have been given under oath. So much for the argument that the Rule must be read in a slavishly literal fashion, as distinct from in harmony with its common law

origins. Bruno and DeMatteis were under oath in the grand jury.

In addition, Rule 804(b)(1) speaks of motive and opportunity to develop the prior testimony. Yet no modern court takes that standard literally. For example, courts routinely interpolate the requirement that a party have been represented at the earlier hearing by counsel. See cases collected in 4 *Weinstein's Evidence* ¶ 804(b)(1)[04].

Rule 804(b)(1), as proposed by the Advisory Committee,would have permitted admission of all former testimony if the party against whom it was offered had an opportunity to cross-examine. The "similar motive" language was limited to former testimony in a proceeding to which the present opponent had been a stranger. The House of Representatives amendment into the present form was concurred in by the Senate on the ground that "the difference between the two versions is not great." The various legislative histories and Advisory Committee Notes are collected in all the West Publishing annotated versions of the Federal Rules of Evidence.

2. All Rules Of Evidence That Permit A Party To Block Introduction Of Reliable Evidence Will Be Dispensed With As Irrelevant If The Party Seeks To Use the Rule As A Shield Against Full Disclosure Of A Half-Told Truth, That Is, If Adversarial Fairness Demands

The Second Circuit rested its decision on "adversarial fairness." The government rejects this rationale. In fact, the law of evidence—particularly in criminal cases—is imbued with the principle that a

party's right to rely on a rule of exclusion is cut off when adversarial fairness demands it.[34]

For example, the Advisory Committee's proposed Federal Rules of Evidence included provisions for evidentiary privileges. These provisions were rejected by Congress in favor of Federal Rule of Evidence 501. Every one of those proposed rules was subject to an implied exception in the interest of adversarial fairness. These exceptions cannot be found in the text. 24 C. Wright & K. Graham, *Federal Practice & Procedure*, § 5506, at 562-63 (1986), and 1991 Supp. at 82-86.

The proposed attorney-client privilege had five exceptions. Yet courts and commentators agree that if a party seeks affirmatively to rely upon a lawyer's advice in furthering a litigation position, the adversarial fairness principle kicks in and permits the adversary to introduce other evidence that would otherwise be protected by the attorney-client privilege. In *United States v. Miller*, 600 F.2d 498 (5th Cir.), *cert. denied*, 444 U.S. 955 (1979), the defendant testified on direct examination to a communication from his lawyer. Judge Tjoflat held that the defendant had opened the door by putting "his version of a privileged communication in evidence," and that the

---

[34] Courts allow specific instances of conduct to be proved to attack credibility, despite the prohibition of Federal Rule of Evidence 608(b), under a "door-opening" theory. This again is the concept of adversarial fairness at work. 1 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 616-18 (5th ed. 1990). Indeed, Rule 806 impeachment need not satisfy Rule 608(b) requirements. *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

prosecutor could then utilize the entire communication "to get at the truth."

The physician-patient privilege ends when the patient puts physical condition in issue. 5 C. Wright & K. Graham, *supra*, § 5506.

The Fifth Amendment privilege may be lost by answering potentially incriminatory questions. This result may be called "waiver," but the witness need not be warned and need not make any intentional relinquishment of a known right. *Rogers v. United States*, 340 U.S. 367 (1951). A more sensible rationale is that the witness cannot cut off complete inquiry after having opened the subject. This is a function of adversarial fairness.

No more important privilege to the government can be found than "state secrets." Yet, in *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950), Judge Learned Hand said this:

> This [state secrets] privilege will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege. It is, however, one thing to allow the privileged person to suppress the evidence, and, *toto coelo*, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses. In *United States v. Andolschek*, we held that, when the Government chose to prosecute an individual for a crime, it was not free to deny him the right to meet the case made against him by introducing relevant documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such "state secrets" as might be relevant to the defence. To that we adhere.

185 F.2d at 638.

In *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944), cited with approval in *Dennis v. United States*, 384 U.S. 855, 873, n.20 (1965), the trial judge had excluded relevant official reports offered by the defense. The government relied on a Treasury Department regulation that forbade production and introduction in evidence.

The Second Circuit acknowledged that "in *Boske v. Comingore*, 177 U.S. 459, the validity of a similar regulation was upheld." Thus, the case presented the identical dilemma as that which faced the Second Circuit here—a rule that might literally bar the evidence. Judge Learned Hand made short work of this problem:

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess;

> it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

142 F.2d at 506

In *Alderman v. United States*, 394 U.S. 165 (1969), the Court was asked by the Department of Justice to permit *in camera* judicial examination of illegal wiretapped transcripts. This Court rejected that proposal, again relying on adversarial fairness. Indeed, in a case joined for decision in *Alderman*, the records involved surveillance of Soviet nationals engaged in espionage. As Justice White wrote:

> Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records.

394 U.S. at 183-184.

The Court iterated in *Alderman* that the government could choose between disclosing and dismissing—again an unquestioned executive prerogative was recognized, but subjected to a condition.

The same considerations are reflected in *Roviaro v. United States*, 353 U.S. 53 (1957): the informer

privilege must yield to the defense need for adversary inquiry into the circumstances of the alleged offense.

A defendant who takes the stand and testifies in conflict with a suppressed prior statement or item of physical evidence may be confronted with the suppressed matter. One principal rationale of these cases is to limit the impact of truth-suppressing rules in the interest of adversarial fairness. The defendant cannot use the exclusionary rule to "provide himself with a shield against contradiction of his untruths." *Walder v. United States*, 347 U.S. 62, 65 (1954). Four members of the Court thought in *Jones v. Illinois*, 493 U.S. 307 (1990) that the *Walder* principle should be expanded.

Rule 804(b)(1) must be read by the same canons, lest parties' sharp practices bury truths they have themselves created.[35] The last paragraph of 804(a) says that "the proponent" cannot take advantage of an unavailability obtained by his or her procurement or wrongdoing.[36] The rule is silent as to the role and

---

[35] Federal Rule of Evidence 102 states:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

These goals are served by decisions such as the present one, denying a party power to block reliable evidence by invoking a principle that his own conduct has made inappropriate.

[36] This requirement is of constitutional dimension in criminal cases. *See Motes v. United States*, *supra*. In *Motes*, the hearsay was inadmissible because the government negligently let the witness escape custody and become unavailable. There was no showing of culpable wrongdoing. By a parity of reasoning, the

responsibility of the opponent,and the court of appeals sensibly declined to go any further than the text required, and properly cited a general principle of statutory construction.[37]

3. The Government Should Not Be Able To Prevent Admission In Evidence Of Former Testimony Offered By A Defendant When It Has Created The Testimony Knowing Of Its Importance.

Salerno II, as explained in *Bahadar*, is limited to testimony the government "created." The most powerful considerations of adversarial fairness were set in motion by the government's tactics here. With indictments already in hand, and issues and defendants identified, the government chose to grant use immunity and interrogate on the basic issues. It at that time valued the testimony at a certain cost—the cost of complying with the use immunity statute.

Indeed, it may have been trying to head off defense use of DeMatteis and Bruno at trial, or to tie them to a story in accordance with its own theory. The government wants to have it both ways. Often, it will call witnesses before the grand jury to question them in secret without their lawyers present. If the witness appears at trial, regardless of who calls him, the government can then make substantive use of the grand

court of appeals need not have found culpability by the government to hold the witness not unavailable to it.

[37] In similar fashion, the state may not intimidate a witness and make him unavailable. *Webb v. Texas*, 409 U.S. 95 (1972). The state may not use hearsay until it tries even discretionary means to obtain live testimony. *Compare Barber v. Page*, 390 U.S. 719 (1968), with *Ohio v. Roberts*, 448 U.S. 56 (1980).

jury testimony to impeach. Federal Rules of Evidence 607 and 801(d)(1)(A) make this possible.[38]

Now we see the government's proposed rule in context: If the grand jury witness gives testimony that inculpates the defendant, it will be admissible by the simple expedient of calling the witness at trial, or impeaching him if the defendant calls him. If the witness persists in giving exculpatory testimony, the government will bottle it up by resisting admission under Rule 804(b)(1).

This Court has warned the government that the grand jury—where witnesses come to testify in secret without counsel—may not be used to develop exculpatory evidence that may then be suppressed. As the Court said in *Dennis*, 384 U.S. at 873:

> In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.

This principle has teeth. In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the Court held that if the government had used the grand jury to gather evidence for a civil case, and not for a potential indictment, this subversion of criminal procedure would require disclosure of the grand jury minutes to the defense. On remand, the district court

[38] This tactical opportunity to use the "intimidating" power of the grand jury is underscored by 1 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 566-67 (5th ed. 1990).

found that the government had indeed engaged in this kind of misconduct. *See* C. Wright, *Federal Practice& Procedure*, Criminal 2d, § 109, at 277 nn. 6-8.

The lower federal courts have uniformly condemned use of the grand jury to gather evidence for a pending case. *See generally United States v. Gibbons*, 607 F.2d 1320, 1328 (10th Cir. 1979)(collecting cases). There is at least an aroma of that tactic in this case, given that these defendants had already been indicted when the grand jury was reconvened to hear the testimony first of DeMatteis then of Bruno.

4. The Second Circuit Adverted To, But Did Not Decide, The Constitutional Issue That Would Be Presented By Exclusion of Relevant Exculpatory Testimony.

In *Salerno II*, the court of appeals obeyed the "time-honored rule that we should not reach constitutional issues unless absolutely necessary." 937 F.2d at 807; *see also Bahadar*, 1992 WL 9390, at *19. Defendants had raised and preserved those issues.

This Court's decisions put the constitutional issue in sharp focus. The government is here saying that a rule of evidence should be interpreted to exclude evidence possessing the strongest possible guarantees of reliability—oath and cross-examination.

In *Davis v. Alaska*, 415 U.S. 308 (1974), defense counsel sought to ask a prosecution witness about his juvenile record, to show that the witness's juvenile probationary status gave him a motive to favor the prosecution. An Alaska statute seemingly forbade the disclosure. This Court held that the right of confrontation required the State to permit the inquiry.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court refused to permit Mississippi to apply its

hearsay rule to bar admission of reliable exculpatory hearsay. The rationale of these cases is discussed in P. Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 95 (1974); Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 Mich. L. Rev. 1465 (1975).[39]

C. The Court of Appeals Was Applying Well-Recognized Principles When It Held That DeMatteis and Bruno Were Not "Unavailable" To The Government, Which Had Already Immunized Them.

The Rule speaks of "unavailability." Unavailability to whom? Because the admission of the former testimony rests on "necessity," the proponent must generally show unavailability *to himself* of the live testimony. *Compare* Wigmore § 1414. For example, if a witness called by the government decides, through fear of or connivance with the defendant, not to testify, that witness is unavailable in the only way the rule requires, and a prior hearsay statement will be received. *See* 4 Weinstein & Berger, *Federal Rules of Evidence* ¶ 804(a)[01], at 804-36 n.8 and accompanying text.

The cases cited in the Weinstein-Berger treatise represent application of the same principle applied by the court of appeals in this case. The fearful or conniving witness is not unavailable to the defendant,

---

[39] As Professor Westen has shown, parity is a key concept in Sixth Amendment compulsory process/confrontation law. The government would clearly be able to use this kind of former testimony if a defendant's counsel had as energetically sought out and interrogated a witness under oath. *See, e.g., Ohio v. Roberts, supra. See also* Federal Rule of Evidence 804(b)(5).

who can with a few well-chosen words secure his testimony. The government's proposed double unavailability principle has no basis in the Federal Rules of Evidence, invites evidentiary gamesmanship in civil and criminal cases, and is redolent of the rigid "same case" and "same parties" limits ridiculed by every discerning commentator since Bentham and abolished by the Rule.[40]

The government complains that the Second Circuit has unfairly interfered with its prerogative to grant or deny immunity. Not so:

1. The Second Circuit has persuasively denied any such intention, in *Salerno II* and *Bahadar*. The court of appeals knows that immunity is an executive prerogative. That is not the issue here. The government had already granted DeMatteis and Bruno immunity, and the record shows that at least DeMatteis's immunity would have permitted the government to cross-examine him at trial. One may assume that Bruno's immunity was in the same form.

So the witnesses were not unavailable to the government, since the government had drafted papers that made them available. The government's tactical decision to argue against admissibility by claiming that

---

[40] In *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the Court upheld a regulation forbidding Department of Justice employees from producing official papers in response to subpoenas. Justice Frankfurter concurred because he assumed that such a holding was subject to an implicit condition that relevant evidence would be producible if the subpoena were served on a senior official such as the Attorney General. The alternative, he said,"would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle." 340 U.S. at 473. Those words are relevant here.

the witnesses were unavailable is perhaps permissible, but like many other tactical choices it carries a price.

Even if one did not construe the immunity grants in accordance with their terms, the court of appeals' decision is still quite narrow, given that the government had already immunized them once. The fact that the government submitted an *ex parte* package deriding the witnesses and their testimony merely points up how little a cost they are being asked to pay. If they had all that evidence independent of the prior immunized testimony, they could prosecute DeMatteis and Bruno without difficulty.

2. As discussed above, the government's executive prerogatives are often cut off by the act of bringing a criminal charge.

3. The government greatly overstates the burden allegedly placed on it. This Court has repeatedly compelled the sovereign to choose between letting alleged wrongdoers go free and granting use immunity, for example, in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). The Court, in an opinion by Chief Justice Burger, invalidated New York Election Law 22, which put the respondent Cunningham to the choice of waiving his Fifth Amendment privilege or forfeiting his party office when called to testify before a grand jury. The Court reaffirmed cases holding that the State is validly put to a choice between granting use immunity and foregoing its power to punish.

Conclusion

This case came here on the government's representation that the Second Circuit had issued a broad-based opinion that ignored the realities of prosecuting hard cases.

Now the Second Circuit has again clarified, in *Bahadar*, just how sensible and narrow is its decision. Revelation of the DeMatteis and Bruno grand jury transcripts makes the government's factual arguments hypothetical at best.

The government concedes that grand jury testimony is frequently admitted in federal criminal trials, under Federal Rule of Evidence 804(b)(1) or 804(b)(5). The government says "We do not suggest that grand jury testimony will never be admissible against the government under Rule 804(b)(1). USB 14 n.5. Given that concession, it is difficult to see why the government thinks this case is worthy of review on certiorari. It would be hard to find a more compelling factual basis for admitting the former testimony. The writ should be dismissed as improvidently granted.

If the case is to be resolved on the merits, we respectfully submit that the court of appeals' decision should be affirmed.

Respectfully submitted,

MICHAEL E. TIGAR*
727 East 26th Street
Austin, Texas 78705
(512) 471-6319
**Counsel of Record*

GUSTAVE H. NEWMAN, ESQ.
NEWMAN & SCHWARTZ
641 Lexington Avenue
New York, New York 10022
(212) 308-7900

ROBERT ELLIS
150 East 58th Street
New York, New York 10022
(212) 593-3440

ALBERT GAUDELLI
WALTER P. LOUGHLIN
MUDGE, ROSE, GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7824

FREDERICK HAFETZ
ADAM THURSCHWELL
GOLDMAN & HAFETZ
60 East 42nd Street
New York, New York 10165
(212) 682-7000

JOHN JACOBS
1725 York Avenue
New York, New York 10028
(212) 608-8890

HERBERT J. MILLER
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.
Washington, DC 20037
(202) 293-6400

MARVIN B. SEGAL
41 Madison Avenue
New York, New York 10010
(212) 481-6000

PATRICK M. WALL
36 West 44th Street
New York, New York 10036
(212) 840-7188

No. 91-872

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-872

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Federal Rule of Evidence 804(b)(1) makes former testimony admissible "if the party against whom the testimony is * * * offered * * * had an opportunity *and similar motive* to develop the testimony by direct, cross, or redirect examination" (emphasis added). The court of appeals held, however, that "the government's motive in examining the witnesses at the grand jury was *irrelevant*," Pet. App. 21a (emphasis added); see Pet. App. 24a, because the government had the ability to immunize them and thus make them available at trial.

Respondents seem unable to decide whether to defend the court of appeals' ruling. In some places,

they indicate that they agree with the court of appeals' conclusion that Rule 804(b)(1)'s express requirement of "similar motive" as a precondition to the admission of former testimony is "irrelevant" or "evaporates" (Pet. App. 21a) when the declarant invokes his Fifth Amendment privilege and the testimony is offered against the government. Thus, respondents argue that the court of appeals "demonstrat[ed] the irrelevance of motive," Resp. Br. 22 n.27, that the "*opportunity* [to cross-examine] is all that is required," Resp. Br. 26, and that " 'similar motive' * * * may not be relied on when doing so violates adversarial fairness," Resp. Br. 30. In other places, however, respondents take a different approach. They argue, in conflict with the district court's findings and the court of appeals' express acknowledgement that the government "may have had no motive before the grand jury to impeach the [declarants]," Pet. App. 19a, that the government *did* have a "similar motive" to develop the testimony of Bruno and DeMatteis in the grand jury. See Resp. Br. 19-30. In our view, both approaches are mistaken.

1. Respondents advance several arguments in support of the court of appeals' holding that the similar motive requirement is "irrelevant" to the admissibility of Bruno's and DeMatteis's testimony under Rule 804(b)(1). First, respondents decry what they term our "slavishly literal" reading of Rule 804(b)(1). Resp. Br. 31. They contend that "interpretation of statutes and rules on former testimony are often relaxed by courts to admit reliable hearsay." Resp. Br. 31. In support of that proposition, they cite a statement in an early edition of Dean McCormick's treatise on evidence. In addition, they assert that courts have added requirements not explicitly included in the Federal Rules. Resp. Br. 31-32.

Respondents' explanation betrays the same misapprehension of the legal status of the Federal Rules of Evidence that we identified in our opening brief. Br. 15-19. The Federal Rules of Evidence were enacted into law by Congress after extensive debate. By their own terms, they govern the admission of evidence in the federal courts. Fed. R. Evid. 101. They are, "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [their] mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). Thus, unlike the statutes mentioned in Dean McCormick's treatise, which were merely " 'declaratory' of the common law, so far as they go, and not the exclusive test of admissibility," McCormick, *Evidence* § 230, at 481 (1st ed. 1954), the Federal Rules of Evidence are a comprehensive codification of the law of evidence. Although many provisions of the Federal Rules give a trial court flexibility in ruling on the admission of evidence, the Rules leave no room for a court of appeals, dissatisfied with the result to which the Rules have led, simply to disregard directly applicable provisions of the Rules.[1]

---

[1] The comprehensive nature of the Federal Rules is particularly evident in their exhaustive treatment of the law of hearsay, which includes a general prohibition on hearsay evidence (Rule 802), subject to 23 specific exceptions enumerated in Rule 803 and four enumerated in Rule 804, as well as the two residual exceptions in Rules 803(24) and 804(b)(5). While the Rules provide room for growth and adaptation of the law of evidence—in particular, in the residual exceptions—they leave no room for a court to hold hearsay evidence admissible despite its failure to satisfy either the specific exceptions or the residual exceptions.

Respondents' examples of alleged judicial departures from the requirements of the Federal Rules fail to establish respondents' broad principle that provisions of the Federal Rules may be dispensed with in the discretion of an appellate court. Thus, respondents assert that Rule 804(b)(1) does not specifically require that former testimony be given under oath if it is to be admissible. Resp. Br. 31-32. But that omission does not justify reading the term "testimony" out of the Rule; it simply requires a court to determine whether "testimony" within the meaning of the Rule can ever include unsworn statements. Similarly, respondents argue that the party against whom the testimony is offered must have been represented by counsel at the earlier proceeding. Resp. Br. 32. Any requirement of representation by counsel, however, is not one that is simply read into the Rule as a matter of a court's preference or sense of fairness; instead, it is a component of the opposing party's "opportunity" to develop the testimony at the prior proceeding. In short, respondents' examples illustrate that a court may refine the standards imposed by the Federal Rules in the course of applying the key terms of the Rules to a given case. But respondents' examples do not support their much more ambitious claim that a court may simply hold that evidence is admissible notwithstanding its acknowledged failure to satisfy the specific requirements of the Rules.

Second, respondents assert that, when a court's view of "adversarial fairness" demands it, any rule excluding reliable evidence "will be dispensed with." Resp. Br. 32. Initially, that principle, even if correct, would not support respondent's claim. The district court found the former testimony of Bruno and DeMatteis to be unreliable, see Pet. App. 51a, and to

lack any "circumstantial guarantee of trustworthiness," Tr. 18,319. The court of appeals did not disturb those findings. Accordingly, the testimony of Bruno and DeMatteis has to be considered *un*reliable, at least for purposes of this case. Respondents' principle, even if true, therefore would not suffice to establish that the testimony was admissible.[2]

In any event, respondents advance no persuasive argument in support of their broad principle that a court's view of "adversarial fairness" overrides specific requirements of the Rules. Respondents argue that each of the rules concerning evidentiary privileges proposed by the Advisory Committee—and rejected by Congress—included "an implied exception in the interest of adversarial fairness" that "cannot be found in the text." Resp. Br. 33. Of course, the evidentiary privileges at issue were *not* codified in the Federal Rules, and respondents' hypotheses concerning decisions that might have been reached had Congress accepted the Advisory Committee's rules

---

[2] Respondents also argue (Resp. Br. 40-41) that applying Rule 804(b)(1) according to its terms in this case would trigger the need to reach constitutional issues concerning their Confrontation Clause rights. If respondents were correct that there were constitutional issues lurking in this case, those issues would simply have to be reached. For there is no authority suggesting that a court may disregard the specific terms of a duly enacted statute simply in the interest of avoiding a constitutional issue. In any event, applying Rule 804(b)(1) according to its terms would not present any serious constitutional question. Neither *Davis* v. *Alaska*, 415 U.S. 308 (1974), nor *Chambers* v. *Mississippi*, 410 U.S. 284 (1973)—the two cases cited by respondents—suggests that hearsay testimony that has been found to possess no circumstantial guarantees of trustworthiness and whose truthfulness has been "seriously undercut," see Pet. App. 51a, must be admitted into evidence.

amount to pure speculation. In any event, this is not a case, like most of those cited by respondents, see Resp. Br. 32-36, in which the government has introduced evidence concerning allegedly privileged matter and then sought to bar a defendant from introducing further evidence concerning that same matter. The government did not introduce any evidence concerning Bruno's and DeMatteis's grand jury appearances, and it thus violates no principle of "adversarial fairness" for the government to object to respondents' introduction of that evidence.[3]

Finally, respondents argue (Resp. Br. 38) that the court of appeals' holding "is limited to testimony the government 'created,' " and that, at least as to that testimony, the court of appeals acted correctly in disregarding the similar motive requirement.

Respondents are mistaken. As to the scope of the court of appeals' holding, the Second Circuit in a decision filed one day after the petition for certiorari in this case was granted did indeed appear to limit its holding in this case to immunized former testimony. See *United States* v. *Bahadar*, 954 F.2d 821, 827-829 (1992). But the rationale of the court in

[3] Respondents also appear to argue (Resp. Br. 37-38) that the last paragraph of Rule 804(a), which provides that "[a] declarant is not unavailable as a witness if [the unavailability] is due to the procurement or wrongdoing of the proponent of a statement," in some way supports the court of appeals' result. To begin with, the last paragraph of Rule 804(a) is inapplicable in this case, since the government has engaged in no "procurement or wrongdoing" to obtain the unavailability of Bruno and DeMatteis. Their unavailability is due entirely to their own, independent decisions to invoke their Fifth Amendment privilege. In any event, as we explained in our opening brief (Br. 25-26), a determination that Bruno and DeMatteis were available to the government would not render their testimony admissible under the Federal Rules.

the present case was based on the fact that the government could make the declarants available by a grant of immunity, not the fact that the government had previously immunized the declarants in different circumstances and for a different purpose. See Pet. App. 21a-22a.[4] In any event, the court of appeals in *Bahadar* adhered to the crucial premise underlying the decision in this case. Despite acknowledging that the similar motive requirement is a "protective shield * * * written into rule 804(b)(1)," 954 F.2d at 828, the court continued to take the view that the similar motive requirement "could not be invoked by the government" where it was unnecessary to preserve "adversarial fairness." *Ibid.* While we disagree with the proposition that applying the Rule as written would contravene any principle of "adversarial fairness," our more fundamental disagreement is with the court's belief that a court applying the Federal Rules of Evidence is free to pick and choose among the requirements of those Rules depending on its own sense of fairness, in general or in a particular case.[5]

[4] The court stated that when a declarant is "available to the government * * * through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant." Pet. App. 21a. According to the court, "[w]hen the reason for the requirement [of similar motive] evaporates, so does the requirement." *Ibid.* (citing N. Singer, *Sutherland Statutory Construction* § 45.12, at 54-55 (4th ed. 1984)).

[5] Application of the court of appeals' principle is particularly troubling when, as here, it is used to reverse a conviction on the ground that the district court—which is in the best position to judge the "fairness" of the proceedings—simply applied the Federal Rules as written, rather than as modified in accordance with the court of appeals' sense of "adversarial fairness."

2. Respondents also argue (Resp. Br. 19-30) that the government did have a similar motive to develop the testimony of Bruno and DeMatteis in the grand jury. That argument, however, is incorrect and, in any event, does not address the issue on which this Court granted certiorari.

The court of appeals manifestly did not rest its decision on any finding that the government had a similar motive. The court's only comment concerning the government's motive was its statement that it "agree[d] that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis." Pet. App. 19a.[6] The court's decision plainly rested on its calculation that the government's ability to grant immunity to the declarants rendered Rule 804(b)(1)'s similar motive requirement "irrelevant." Pet. App. 21a, 24a. Indeed, when the court attempted in *Bahadar* to explain its decision in the present case, it did not indicate any doubt that the government lacked a similar motive. Instead, the court repeated its holding that the similar motive requirement "could not be invoked by the government." *Bahadar*, 954 F.2d at 828. In short, the decision of the court of appeals did not rest on any determination of similar motive. And the question on which this Court granted certiorari was whether evidence was admissible pursuant to Rule 804(b)(1) when the opposing party lacked a similar motive, not whether the government in fact had a similar motive on the facts of this case.

---

[6] Although respondents speculate that the court of appeals made that acknowledgement "*arguendo* for purposes of demonstrating the irrelevance of motive," Resp. Br. 22 n.27, that speculation finds no support in the court of appeals' opinion.

a. As this case comes to this Court, there is little doubt that the government's motive to develop the testimony of Bruno and DeMatteis in the grand jury differed substantially from its motive to cross-examine them, had they testified at trial. The district court was in the best position to evaluate the government's motives to develop the grand jury testimony of Bruno and DeMatteis, as well as to consider what the government's motives would have been upon being presented with the same evidence at trial. In a carefully considered, written opinion, the district court found that the government did not have a similar motive. Pet. App. 42a-52a. As noted above, the court of appeals at least suggested that it agreed with that finding. There is thus no reason for this Court to question that finding. Cf. *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (citing cases); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

The facts of this case demonstrate that the finding of the district court was correct. In our opening brief, we explained (Br. 11-15) that the government typically does not have a motive to develop grand jury testimony as envisioned by the Rule, for several reasons: the government must maintain the secrecy of the grand jury proceedings; the government has little incentive to discredit a grand jury witness by means of a vigorous, on-the-spot examination; and the issues before the grand jury are typically quite different from those at trial. All of those factors were present in this case.

Respondents argue that the secrecy of the grand jury proceedings was not an issue at the time Bruno and DeMatteis testified because "all the key parties and issues had been broadcast by the government in two indictments," Resp. Br. 20, and because the government confronted Bruno and DeMatteis with evidence derived from a wiretap, Resp. Br. 20 & n.25.

At the time Bruno and DeMatteis testified, the grand jury was continuing its investigation to determine whether additional individuals were involved in the racketeering enterprise and to determine whether operation of the racketeering enterprise had involved additional criminal activity. In fact, 11 of the 40 counts and 9 of the 44 predicate acts of racketeering included in the indictment on which respondents were tried did not appear in the initial indictment handed down before Bruno and DeMatteis testified. Additional counts and additional defendants were also under investigation when Bruno and DeMatteis testified, but those prospective charges were not included in the indictment. Consequently, respondents' assertions that the investigation was over or that all of the relevant facts were already public at the time Bruno and DeMatteis testified is without foundation.

Respondents also assert that the government in fact conducted a vigorous and thorough examination of Bruno and DeMatteis. Resp. Br. 21. That contention is mistaken. As is made clear by the portions of the grand jury testimony of Bruno and DeMatteis quoted by respondents (Resp. Br. 7-8, 10, 11), their examination in the grand jury was designed to elicit specific testimony sufficient to "tie [the witnesses] to the allegedly false story" to provide the basis for a perjury prosecution, if one were brought. Resp. Br. 21. But the examination by no means constituted a thorough development of their testimony, and Bruno and DeMatteis were never confronted with most of the detailed evidence in the government's possession indicating that their story was false.[7] See Resp. Br.

[7] Respondents assert that, under our argument, "the government's impetus to cross-examine a witness turns on *its own* evaluation of the witness' credibility, and not on any concern about what *the grand jury's* evaluation of the witness might be." Resp. Br. 29-30. In fact, we rely on the concern about "the grand jury's evaluation of the witness" as an additional reason that a prosecutor's motive to conduct an examination in the grand jury generally differs from his motive to confront the same witness at trial. Unlike at trial, the government can ask the grand jury whether it wishes a particular line of testimony developed further, or whether it believes that the testimony of a given witness has, or has not, been refuted by other evidence the grand jury has heard. Once informed that the grand jury does not want to hear more testimony from that witness, the prosecutor has no motive to continue the examination. Under the regime instituted by the court of appeals, however, the prosecutor would have to continue to examine the witness regardless of the grand jury's wishes, since to fail to do so could result in the admission of the witness's unimpeached testimony at trial.

21. Although Bruno and DeMatteis were asked a number of questions concerning their participation in and knowledge of the scheme to rig bids on large Manhattan construction projects, their answers were, by and large, accepted and not directly challenged. In particular, although the existence of one tape was disclosed, they were not confronted with any of the other tapes of conversations concerning the bid-rigging scheme, nor were they confronted with testimony that had been given by a number of individuals who later testified at trial but whose testimony, at the time of the grand jury appearances of Bruno and DeMatteis, remained unknown to respondents.[8]

[8] Respondents argue that the issues before the grand jury and those at trial, with respect to the testimony of Bruno and DeMatteis, were identical. Resp. Br. 21-22. That contention is mistaken. At trial, the testimony of Bruno and DeMatteis at best could have suggested that Cedar Park, the concrete firm Bruno and DeMatteis controlled, was not complicit in the bid-rigging scheme. Although the grand jury heard evidence

In short, the government's treatment of Bruno and DeMatteis in the grand jury was determined by the need to maintain the security of the investigation, the lack of incentive to confront Bruno and DeMatteis with the extensive evidence contradicting their testimony, and the distinct issues and context of the grand jury setting. Those were concerns that would have had little or no force if Bruno and DeMatteis had testified at trial. The district court, based on its familiarity with the trial proceedings, its examination of the grand jury transcripts and other sealed materials, and the submissions of counsel, determined that the government lacked a similar motive. There is no basis in this record for overturning that finding.

b. Respondents also argue (Resp. Br. 22-26) that the admissibility of the grand jury testimony of Bruno and DeMatteis "presents an unexceptional application

---

relevant to that question, respondents advance no reason to believe that the grand jury was ever asked to decide whether Cedar Park—or Bruno and DeMatteis—were involved in the scheme. None of the charges added in the superseding indictments named Cedar Park or Bruno and DeMatteis. Moreover, contrary to respondents' contention, Cedar Park's complicity in the bid-rigging scheme was ultimately of little moment to the grand jury, especially in light of the probable cause standard by which the grand jury had to make its determinations. Cedar Park bid on only one of the 16 construction projects on which, according to the indictment, bids had been rigged, and Cedar Park ultimately withdrew even that bid. Even more significantly, Cedar Park started its last Manhattan job in 1982 and went out of existence approximately one year later. Eight of the 16 projects were not even bid until after Cedar Park had effectively left the business. Thus, respondents' contention (Resp. Br. 22) that the grand jury could not have handed down the superseding indictments in this case if it had believed that Cedar Park was not involved in the bid-rigging scheme is far-fetched.

of a hoary evidentiary principle" that "where the issue at stake in the former proceeding's testimony was substantially the same as the issue for which the former testimony is offered at trial, and the party against whom it is offered had the opportunity to cross-examine the witness, the motives are 'similar' and the hearsay comes in." Resp. Br. 22. According to respondents, that principle "was incorporated and expanded when Congress enacted Rule 804(b)(1)." Resp. Br. 22-23.

Respondents are mistaken. The ultimate questions in determining the admissibility of evidence under Rule 804(b)(1) are whether the opponent had an "opportunity *and similar motive*" (emphasis added) to cross-examine the declarant in the prior proceeding, not whether the opponent had an opportunity to cross-examine and whether the issues were substantially the same. As we explained in our opening brief, the Advisory Committee considered alternative formulations of the Rule, including one in which "identity of issues" would be the ultimate factor determining admissibility. See Br. 13 n.4. But the Committee ultimately rejected those alternatives and framed the rule in terms of "similar motive," a formulation that remained in the Rule when it was finally enacted into law by Congress.[9]

At bottom, respondents disagree with Congress's decision to frame Rule 804(b)(1) in terms of similar

---

[9] To be sure, identity of issues may well remain a necessary condition of admissibility, for if the issues in two proceedings are not substantially the same, a party would be unlikely to have a similar motive to cross-examine testimony given in the two proceedings. But identity of issues is not sufficient to prove admissibility under Rule 804(b)(1). In the Rule as enacted, similar motive, not identity of issues, is the linchpin of admissibility.

motive, rather than identity of issues. Respondents repeatedly refer to the similar motive requirement in derogatory terms as permitting exclusion of evidence based on "a party's tactical decisions," Resp. Br. 24, 27, its "cross-examination strategy," Resp. Br. 25, or its view of what would be "expedient," Resp. Br. 27. Respondents' characterizations, however, miss the point.

When a party declines to cross-examine a witness because that party believes that its strongest case on the legal issues in the proceeding will be more effectively advanced thereby, that party has made a strategic decision that should bind the party when the witness's unimpeached testimony is offered at another proceeding involving the same legal issues. Accordingly, a court presented with such a case would reasonably find that the party had a similar motive to cross-examine in both proceedings, notwithstanding its failure to do so. But where, as here, a party declines to develop testimony fully for wholly legitimate reasons—indeed for reasons crucially related to the need to preserve the integrity of the proceeding—that are unrelated to that party's attempt to present its strongest case on the legal issues before the tribunal, that party's decision is not a matter of "strategy," "tactics," or "expedience." Rather, the party has declined to undertake a full examination because it lacked a motive to do so, and Congress's determination, embodied in Rule 804(b)(1), that that party ought not be bound by its prior handling of the witness should be respected.

CONCLUSION

For the foregoing reasons and those given in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

APRIL 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45407

No. 91-872

IN THE

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY SALERNO, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

JED S. RAKOFF
One New York Plaza
New York, New York 10004
(212) 820-8574

Counsel for Amicus Curiae
New York Council of Defense Lawyers

Of Counsel:
LAUREN RESNICK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Miscellaneous

IN THE

Supreme Court of the United States

October Term, 1992

No. 91-872

UNITED STATES of AMERICA,

Petitioner,

v.

ANTHONY SALERNO, et. al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The New York Council of Defense Lawyers (NYCDL) consists of prominent members of the New York criminal defense bar who practice in the federal courts on a regular basis. NYCDL attempts to address on an institutional level the problems confronting the criminal defense bar in the Southern and Eastern Districts of New York. In fulfilling that role, it has appeared as *amicus curiae*, at both the appellate and trial court levels, in numerous federal cases that have posed critical issues for the criminal defense bar.

This case raises fundamental questions about whether the oversight role of the grand jury and the truth-seeking role of the trial process are both to be subordinated to the government's tactical advantages such as to effectively suppress critical exculpatory evidence and undermine an individual's constitutional right to a fair trial. As such, this case raises issues of broad importance not only to criminal defense lawyers but to the achievement of fair and effective processes for the attainment of truth.

SUMMARY OF ARGUMENT

The Federal Rules of Evidence govern the admissibility of widely varying sources of proof. This broad coverage demands that the Rules be interpreted liberally and flexibly, as the Rules themselves provide. This case involves the application of the former testimony exception to the hearsay rule, Fed. R. Evid. 804(b)(1), but also implicates the proper functioning of the grand jury and the availability to the defense of sworn, exculpatory testimony.

The Second Circuit Court of Appeals concluded that the "similar motive" requirement of Rule 804(b)(1) did not prevent a criminal defendant from presenting at trial the immunized grand jury testimony of two witnesses where (1) the testimony directly rebutted a central allegation of the indictment, and (2) the witnesses were unavailable to the defendants because they invoked their Fifth Amendment privilege. As we show below, two broad arguments support the Court of Appeals' decision.

First, the grand jury was developed to shield the individual citizen against the government. That goal of the institution would be perverted if the government, having enabled the grand jury to obtain critical testimony through its power to immunize a reluctant grand jury witness, could retain unilateral power to make that testimony unavailable to the criminal

defendant at trial despite its highly exculpatory nature. Instead, in view of the overwhelming advantages normally enjoyed by the government in the grand jury -- e.g., the *ex parte* presentation of evidence and the relaxation of the rules of evidence -- allowing the defendant to make use of such crucial exculpatory testimony as still emerges before the grand jury helps to restore some of the historic balance.

Second, this Court has held that rigid adherence to the hearsay rule may operate to deprive a defendant of his or her constitutional right to a fair trial. The Court of Appeals recognized that exclusion of the grand jury testimony at this trial would raise serious due process concerns. Accordingly, the court properly construed Rule 804(b)(1) in a manner that avoided the constitutional question and guaranteed adversarial fairness, a guiding principle for all evidentiary rulings.

POINT I

THE ADMISSION OF OTHERWISE UNAVAILABLE, POST-INDICTMENT EXCULPATORY TESTIMONY DISCLOSED UNDER IMMUNITY IN THE GRAND JURY IS COMPELLED BY THE HISTORIC PURPOSE OF THE GRAND JURY

In light of the grand jury's historic role as a bulwark against prosecutorial overreaching, grand jury testimony elicited by the prosecutor through a grant of immunity should be admitted at a subsequent trial under the "former testimony" exception to the hearsay rule, Fed. R. Evid. 804(b)(1). The Court of Appeals was therefore correct in ruling that its exclusion by the district court was an abuse of discretion.

The government's basic contention that exculpatory grand jury testimony should never be admitted at trial under Rule 804(b)(1) is effectively an argument that the decisions made by

the United States Attorney in assisting the grand jury to ascertain the evidence relevant to a determination of probable cause should have absolutely no impact -- under any circumstances -- on the availability of otherwise unobtainable exculpatory evidence at the subsequent trial. This ignores the grand jury's historic role as a shield against government overreaching. The United States Attorney should not be permitted, as he did here, to misappropriate the grand jury process as an *ex parte* trial tactic.

The courts have long recognized that the grand jury, with its broad investigatory powers, may become an instrument of oppression in the wrong hands. M. FRANKEL & G. NAFTALIS, THE GRAND JURY at 52-53 (1975). "Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power." *In re Groban*, 352 U.S. 330, 352-53 (1957) (Black, J. dissenting). "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination." *United States v. Remington*, 208 F.2d 567, 573 (2d Cir. 1953) (Hand, J.), *cert denied*, 347 U.S. 913 (1954).

To facilitate its inquiry, the grand jury has an almost unlimited power to subpoena witnesses and documentary evidence.

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Blair v. United States, 250 U.S. 273, 282 (1919). Thus, the grand jury's powers of inquiry are not subject to limitations (evidentiary, constitutional, and otherwise) imposed on other tribunals. For example, the grand jury's "operation is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States v. Calandra*, 414 U.S. 338, 343 (1973). Hearsay or otherwise inadmissible evidence can serve as the basis of the decision to indict, *Costello v. United States*, 350 U.S. 359 (1956).

Likewise, no judge presides over the proceedings to monitor the interrogation of witnesses. Furthermore, witnesses, many of whom are at grave risk of incrimination, are unprotected by the Sixth Amendment right to counsel. *United States v. Mandujano*, 425 U.S. 564, 581 (1976). Even retained counsel are excluded from the grand juryroom. "Our society has no comparable institution which sanctions such interrogations of a person 'legally' denied counsel." BOUDIN, "The Federal Grand Jury", 61 Georgetown L. Rev. 1, 3 (1972).

Prosecutors are accorded a great deal of leeway in presenting their cases to grand juries. *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor J. concurring). They are not required to present exculpatory evidence that might undermine their case for indictment. *E.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). "When one realizes that defense counsel is not present before the grand jury, that the normal evidence rules do not apply (meaning that leading questions can be asked), and that the grand jury can be an intimidating body, the power of government to create admissible substantive evidence is readily appreciated." Federal Rules of Evidence Manual, Rule 607 at 566-67 (5th ed. 1990). Nevertheless, prosecutorial conduct in the grand jury is accorded great deference. *See, e.g., Mechanik*, 475 U.S. at 73.

It is therefore the duty of trial courts to prevent the government from unfairly benefitting from its unilateral access to these overwhelming investigatory resources. Thus, when "the traditional role of the grand jury as the arbiter of government prosecution has been eroded . . . to a status as merely another weapon in the government's fact-finding arsenal," 61 Georgetown L. Rev. at 1; *see Beavers v. Henkel,* 3 194 U.S. 73, 84 (1903), trial courts should construe the federal rules of evidence to prevent the United States Attorney from suppressing the otherwise unavailable exculpatory fruits of his investigatory efforts.

In the case below, the United States Attorney used the broad investigatory might of the grand jury for many months to obtain the subject indictments. As noted in the respondents' brief, DiMatteis and Bruno were called to testify in the grand jury after the initial indictment in *Salerno II* had been returned. Not surprisingly, the witnesses asserted their Fifth Amendment privileges, and the United States Attorney, utilizing his exclusive immunity powers, chose to compel their testimony. The *ex parte* cross-examinations thus ensued in the absence of judicial supervision or defense counsel, and the government thereby "created" the evidence at issue.[1]

Inevitably, DiMatteis and Bruno asserted their Fifth Amendment privileges at trial, and the prosecutor, presented with the more formidable burden of proof in that forum, sought to deprive the defendants of this highly relevant exculpatory evidence by refusing to grant the witnesses identical use immunity for the testimony previously disclosed. The United States Attorney thereby sought to treat the grand jury, and the

---

[1] The credibility of this testimony is a question exclusively reserved for triers-of-fact and is therefore irrelevant to this analysis. However, the fact that the excluded testimony directly undermines the government's case evidences the harmfulness of the trial court's error.

evidence it had obtained, as simply instruments of his office, usable or not as his trial tactics dictated. Thus, his attempt to suppress any use at trial of the otherwise unavailable exculpatory evidence would, if upheld, effectively undermine the grand jury's historic function.

Moreover, the government's reliance on the grand jury secrecy provisions of Fed. R. Crim. P. 6(d) is misplaced (Petitioner's Brief at 11-13). Grand jury proceedings are conducted in secret (1) to prevent potential targets from escaping, (2) to preserve the grand jury's independence, (3) to prevent perjury of witnesses, and (4) to protect the innocent who never get indicted. *United States v. Procter & Gamble Co.,* 356 U.S. 677, 681 n.6 (1958). Even the case relied on by the government, *Butterworth v. Smith,* 494 U.S. 624 (1990) (citing *United States v. Dionisio,* 410 U.S. 1, 11 (1973)), acknowledges that grand jury secrecy is not "a talisman that dissolves all constitutional protection." In fact, none of the traditional bases for grand jury secrecy is implicated in this case.

The admission of DiMatteis' and Bruno's exculpatory grand jury testimony posed no risk of flight. By the time these witnesses were called to testify in the grand jury, all the key participants and issues had been publicly disclosed by the government in two indictments, one of which had already precipitated pre-trial proceedings. DiMatteis and Bruno themselves were listed on numerous public documents as principals in Cedar Park and related entities. In addition, the grand jury had already determined that there was sufficient probable cause to indict. DiMatteis and Bruno were called to testify at trial by the defense, whereupon they asserted their Fifth Amendment privileges; accordingly, their identities as participants were publicly exposed.

Nor did the admission of grand jury testimony under these circumstances implicate perjury concerns. Because DiMatteis and Bruno's testimony denied the existence of the unlawful "Club" on which this RICO prosecution was premised, the prosecutor needed to discredit their testimony to the satisfaction of the grand jury. The United States Attorney thus extensively examined both of these witnesses in the grand jury, using electronic surveillance to impeach their testimony.[2] He had the option of calling the witnesses back to the grand jury at a later time to further impeach them, but he chose to forego that option, apparently satisfied that he had already covered all potential avenues of cross-examination. Finally, if the prosecutor wanted to preserve an action for perjury against these witnesses on the basis of their grand jury testimony, his incentive in the grand jury should similarly have been to tie the witnesses to that testimony.

For the foregoing reasons, the admission under Rule 804(b)(1) of otherwise unavailable, post-indictment exculpatory testimony disclosed under immunity in the grand jury is compelled by the constitutional purpose of the grand jury.

---

[2] There is no risk of exposure of undercover surveillance when witnesses testify after the indictment has been returned. The electronic surveillance used in the investigations herein was turned over to the defense upon indictment as mandated by law.

POINT II

THE COURT OF APPEALS PROPERLY CONSTRUED THE "SIMILAR MOTIVE" REQUIREMENT OF RULE 804(b)(1) SO AS TO AVOID INTERFERING WITH THE DEFENDANTS' RIGHT TO A FAIR TRIAL

As the government acknowledges, "federal courts have substantial authority to determine how the specific provisions of the Rules apply to specific cases." (Petitioner's Brief at 16.) This authority was properly exercised in this case.

Federal Rule of Evidence 102 provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

"By emphasizing abstract goals, Rule 102 indicates that meeting these objectives is of greater significance than determinations of technical impeccability." J. WEINSTEIN, EVIDENCE ¶ 102[01] at 102-6 (1991). Like the federal rules of criminal and civil procedure, the Federal Rules of Evidence "are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen v. United States*, 378 U.S. 139, 142 (1964).

In this case, the Court of Appeals construed the "former testimony" exception of Rule 804(b)(1) in light of a particularly important goal -- avoiding infringement of defendants' due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The court found it "troubling" that the prosecution, having identified Bruno and DeMatteis as exculpatory witnesses,

resisted the admission of their grand jury testimony. (App. at 807). Indeed, the court declared that it would be a "semantic somersault" to say that the due process principles articulated in *Brady* were satisfied despite the exclusion of the exculpatory testimony.

The Second Circuit concluded that a proper construction of Rule 804(b)(1) protected these due process rights. In the court's words, "we rest our decision on our interpretation and application of Fed. R. Evid. 804(b)(1), and not on *Brady*, keeping in mind the time-honored rule that we should not reach constitutional issues unless absolutely necessary." (App. at 807). What the government characterizes as a decision "simply to disregard controlling provisions of the Federal Rules of Evidence" (Petitioner's Brief at 17) is more accurately described as the recognition that the "similar motive" requirement in Rule 804(b)(1) cannot be read in such a way as to defeat a criminal defendant's right to present reliable, exculpatory testimony elicited before the grand jury.

The Second Circuit's references to *Brady* are an invocation of the well-established right of a criminal defendant to present his or her defense. "Whether rooted directly in the Due Process Clause . . . , or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted).

This Constitutional right cannot be frustrated by rigid adherence to a rule of evidence. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), Chambers, on trial for murder, sought to call three witnesses who would testify that another person had admitted to them his commission of the crime. The state courts excluded this testimony as hearsay. This Court reversed, holding that "where constitutional rights directly affecting the

ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302.

Similarly, in *Washington v. Texas*, 388 U.S. 14 (1967), a state statute prohibited Washington from calling as a witness a person charged as a co-participant in the crime. The Court concluded that Washington was "denied his right to have compulsory process of witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id.* at 23.

This Court's more recent cases have also consistently reaffirmed the protection of a criminal defendant's right to present the testimony of crucial defense witnesses. *See, e.g., Taylor v. Illinois*, 108 S. Ct. 646, 653 (1988) ("We cannot accept the State's argument that this constitutional right [to present evidence] may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness"); *Rock v. Arkansas*, 483 U.S. 44 (1987) (state's *per se* rule excluding hypnotically refreshed testimony impermissibly infringes on defendant's right to testify); *Crane*, 476 U.S. at 688-91 (state may not exclude all evidence regarding circumstances surrounding defendant's confession).

In light of its concern with the defendants' right to present their defense, the Second Circuit's reliance on principles of adversarial fairness was particularly appropriate. Recognizing that the "similar motive" requirement was designed to protect the right to cross-examination, the court refused to "countenance the exclusion of [the] grand jury testimony on the ground of purported fairness to the government," which had developed the exculpatory testimony in the grand jury and

unilaterally possessed the power to compel that testimony at trial.

In other words, a narrow or non-functional construction of the "similar motive" requirement would present an obstacle to the admission of critical exculpatory testimony without serving the purpose of protecting the government's adversarial interests. "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984).

Properly understood, rules of evidence provide a framework in which the central goals of the adversary system are realized.

> Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, *e.g.*, *Chambers v.Mississippi*, 410 U.S. 284 (1973). Indeed this right is an essential right of the adversary system itself.
>
> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *United States v. Nixon*, 418 U.S. 683 (1974).

Taylor, 108 S. Ct. at 652.

Under the circumstances here, an element of a hearsay exception, although intended to further adversarial interests, would actually operate to frustrate the adversary process if construed too narrowly. The Court of Appeals properly concluded that the "similar motive" requirement must be construed to be consistent with this higher goal.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit Court of Appeals should be affirmed.

Dated: New York, New York
April 6, 1992

Respectfully submitted,

JED S. RAKOFF
Counsel for Amicus Curiae
New York Council of Defense Lawyers

Of Counsel
LAUREN RESNICK